Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Richard A. Balser and Corinne L. Balser
Petitioners

v.

United States Department of Justice

And

The Office of the United States Trustee
Respondents

On Petition For Writ Of Certiorari

To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Does sovereign immunity abrogated under 11 U.S.C. §106(a) still shield Respondents, and thus ultimately the United States, from being accountable for monetary damages as a consequence of the alleged wrongdoings of the U.S. Trustee and Examiner?

2. Does sovereign immunity shield Respondents from being required to provide declaratory, injunctive or other equitable relief to mitigate the adverse consequences of the alleged wrongdoings of Respondents' officers and/or agents in this bankruptcy case?

3. Does the waiver of sovereign immunity under 11 U.S.C. § 106(b), upon filing of a claim in a bankruptcy case by the IRS, encompass a waiver applicable to a related federal government agency; the U.S. Trustee?

4. Does the demand for fees paid to the Office of the U.S. Trustee from funds of an estate in Chapter 11 bankruptcy qualify as being claims filed against the estate by the U.S. Trustee and thus satisfy the waiver of sovereign immunity?

5. Defects in the proceedings below dealt with notice, hearing, and the failure to abide by limitations and restrictions on the granting of authority to the appointed Examiner in this case. Do these defects raise a question as to procedural due process or of violations of Petitioners' fundamental rights to equal justice under the law?

PARTIES TO THE PROCEEDING

Petitioners-Appellants-Plaintiffs Pro Se

Richard A. Balser and Corinne L. Balser, husband and wife

Respondents-Appellees-Defendants

Department of Justice;

Office of the United States Trustee;

U. S. Trustee (Seattle District): Jan Samuel Ostrovsky;

Attorney for U.S. Trustee: Gail Geiger

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PETITION FOR WRIT OF CERTIORARI

BASIS FOR JURISDICTION

This petition raises Federal questions, including one of *first impression* in the Ninth Circuit, concerning the sovereign immunity of the Department of Justice and the Office of the United States Trustee.

This Court has jurisdiction to review the Ninth Circuit Court of Appeals' Order entered July 9, 2003, for denial of a petition for rehearing and suggestion for rehearing en banc and the April 29, 2003, Judgment and Opinion of the Ninth Circuit Court of Appeals, affirming the United States District Court for the Western District of Washington's dismissal of Petitioners' Complaint by Judgment and Order entered November 21, 2001.

Jurisdiction is provided under the United States Constitution, Article III, Section 2, and under 28 USC §1254(1).

STATEMENT OF THE CASE

This is a Petition to the United States Supreme Court for a writ of certiorari to appeal from an Order of the United States Court of Appeals for the Ninth Circuit, which denied the Petitioners' (then as Appellants') petition for rehearing and rejected the suggestion for rehearing en banc, and from said Court's judgment affirming the judgment of the United States District Court for the Western District of Washington (Seattle) granting dismissal of Petitioners' (then as Plaintiffs') Amended Complaint, under the doctrine of sovereign immunity and the protection from liability by judicial immunity, as applicable (Balser v. Department of Justice, 327 F.3d 903).

In this case, Petitioners Richard and Corinne Balser ("Appellants" or "the Balsers") allege negligent and fraudulent conduct related to the management of their bankruptcy estate

assets and the condoning of such actions by the Office of the United States Trustee ("Defendant," "the Trustee," or "the U.S. Trustee"). The Balsers brought this action against those the Balsers perceived as the responsible governmental units, being the Department of Justice and the Office of the United States Trustee. The District Court dismissed the case on the grounds that the U.S. Trustee was protected from all liability by judicial and sovereign immunity.

On December 18, 2000, the Balsers filed their pro se complaint in the United States District Court for the Western District of Washington seeking relief for various violations of constitutional and statutory rights. The Balsers named as defendants the "Department of Justice" and the "Office of the United States Trustee" and requested a finding for a waiver of sovereign immunity at that time.

On March 26, 2001, a Joint Status Report was filed with the District Court in which each party described their own assessment of the nature and complexity of the case. The issue of sovereign immunity was not raised by the Defendant in this jointly filed report, nor in Defendants' first motion to dismiss filed on July 17, 2001.

Balsers filed an amended complaint, which was accepted by the Court on September 10, 2001. The Court noted that the amended complaint "...unlike their original complaint, contains allegations of specific conduct and actions taken by the United States Trustee in bankruptcy proceedings." The Court concluded that the amended complaint now rendered the Defendants' motion to dismiss moot, as the motion had been brought only under Federal Rule of Civil Procedure 12(b)(6).

With the trial date approaching and still no answer from the Defendant the Balsers requested an extension of the deadline for discovery to be extended beyond the anticipated receipt of an answer. The Defense responded with a motion for

dismissal filed on October 1, 2001, and raised the defense of immunity in his memorandum for the first time.

The Court thereupon dismissed Appellants' Amended Claim on November 21, 2001, holding that the United States trustee was shielded from liability by both sovereign and judicial immunity. The Balsers' motion for reconsideration, filed December 3, 2001, was summarily denied by the Court on December 20, 2001.

The District Court provided no opportunity for the Balsers to support their allegations with respect to the lack of due care in the exercise of statutes and regulations by the governmental units or their agents, or to provide facts relative to whether fiduciary duties and violations of rules and regulations were administrative or judicial in character. There was no hearing or trial on the merits of the Balsers' allegations, and no record of any investigation of the charges made in the Amended Complaint relating to numerous specific claims, including fraud upon the court, collusion, conflict of interest, misrepresentation, perjury, unjust enrichment, violation of fiduciary duties, violations of statutory laws, and the process having wrongfully exceeded authorities and contractual limits set by stipulation. There were numerous violations of the Balsers' constitutional rights as well, in particular with respect to the lack of due process and the failure to gain equal protection under the law.

Synopsis:

This case represents a gross failure in the exercise of executive functions to administer fiduciary duties during a Chapter 11 Reorganization, with the alleged lack of integrity and responsibility being shielded by the improper granting of sovereign immunity to preclude accountability for the consequences of wrongful conduct by a governmental entity:

(a) A "limited appraisal" of an assembly of properties encompassed in a county-approved development project was attested to in a sworn statement by the United States Trustee's appointed Examiner as the "fair market value" of real estate at near $1,000,000, to support a sale near $1.4M. After transfer of title by the Examiner to his buyer, the same property was resold as 80% of the included site then priced at $7,757,000;

(b) An extreme conflict of interest existed to compromise the disinterested status of the Examiner in the above sale transaction, as he simultaneously also employed the attorney representing the benefited buyer as his own counsel in another courtroom in which the United States Trustee, employed the Examiner as the "trustee in a case" under another judge, all without disclosure and without corruption-proof steps to protect the assets of the estates being manipulated. The US Trustee should have required the Examiner to , 1) reference an MAI appraisal (already obtained by Balsers); 2) have the property sold through the Plan of Reorganization (already filed by Balsers); or 3) have the sale be by an auction or advertised through a realty, and 4) certainly be coordinated for execution of the sale documents by the Balsers. Instead, the Examiner executed and filed buyer-drawn documents without any contact with the Balsers.

(c) The shocking disregard for due process in the secretive sale arrangements; the elevation of the Examiner to dispose of 80% of estate assets without notice or a hearing; the Examiner's execution of a simple one paragraph deed transfer covering seven properties with four rented houses by his signing for Balsers then immediately "leaving town" for three days until the sale was consummated by escrow.

(d) The failure of the federal court system in this case is exemplified by the decision of the District Court in the granting of judicial and sovereign immunity that conflicts with relevant decisions by the Supreme Court, which established procedures

for review in other cases. It has been established that an immunity defense requires at least some factual basis to discriminate between administrative tasks and possible judicial tasks in the area of transgression. No court fact finding discovery or hearings were implemented in this case.

Summary of Issues

This case centers on the apparent confusion introduced by the use of a single title having reference to dual, but distinctly different, government officers, which produced two cases. The intended case is that filed by the Petitioners against the Department of Justice and the Office of the United States *Trustee*. (Note: upper case "Trustee" is used for the supervising "Trustee", lower case for the case operating "trustee") The United States *Trustee*, during the events in Chapter 11, which precipitated the intended case, was Jan Samuel Ostrovsky, with the U.S. *Trustee* being represented during court proceedings by attorney Gail Geiger. The U.S. Trustee handles administrative and case management tasks. Sovereign immunity is abrogated under 11 U.S.C. § 106(a) as described below.

The ostensible case is that addressed by the Appellate and District Courts against a hypothetical officer as the United States *Trustee*, being a private *trustee, such* as assigned to assume the operation of an estate in a Chapter 7 bankruptcy. The US *Trustee* did appoint an Examiner whose actions were certainly of critical concern to this case. However, the U.S. Trustee was never authorized to serve as *trustee in a case* for the Balsers.

The Opinion concluded that "...sovereign immunity bars a suit filed against a United States trustee acting in his official capacity based on acts conducted within the course and scope if his employment." The Opinion does not address sovereign immunity with respect to the Department of Justice, the Office of the United States Trustee, The United States Trustee, or, for

that matter, the United States, all as abrogated under 11 USC § 106(a). And yet the Opinion affirmed dismissal of this case on the basis of sovereign immunity. Most of the issues raised on appeal were never addressed at the Appellate Court level.

An extensive study of Chapter 11 Reorganizations reported that less than 7% of businesses which enter this federally-supervised process under the joint jurisdiction of the Office of the United States Trustee and U.S. Bankruptcy Court actually complete the process successfully. Nearly all fail to recover! This case is believed to be symptomatic of several reasons for this unacceptably high failure rate. The Petitioners assert that the United States Department of Justice should be held accountable for the consequences of those related to the lack of due process under a Chapter 11 (as similar consequences in the loss of multi-million dollar assets is prevalent in other Chapter 11 cases known to Petitioners.)

This case alleges an abuse of the process related to bankruptcy. This petition for writ of certiorari proposes to focus on gaining corrective action into the United States Bankruptcy Court process for the Western District of Washington, and perhaps nationwide, by introducing accountability for the adverse consequences of wrongdoings under the administrative, rather than the judicial control of Department of Justice officers and agents.

The foregoing recap provides perspective toward Balsers' preparation of the statements to follow concerning the five questions presented for review by this Court.

Question 1: Abrogation of Immunity: The Petitioners' Opening Brief in the United States Court of Appeals for the Ninth Circuit identified Richard A. Balser and Corinne L. Balser as the Plaintiffs in the case. Balser had originally identified the U.S. Department of Justice and the Office of the United States Trustee as the Defendants. However, U.S

District Judge Marsha J. Pechman first assumed that the pro se action should have named the U.S. Trustee as the Defendant, and then proceeded to grant Defendant's motion to dismiss all claims, without prejudice, as though they had been "correctly" filed against the United States trustee. Judge Pechman included her observation that: "Plaintiff should have pled civil rights claims under *Bivens*...Nonetheless...Plaintiffs case fails...The Office of the Trustee itself, and the Trustee if sued in his or her official capacity, is immune from suit under the doctrine of sovereign immunity."

In the published Appellate Opinion of the Ninth Circuit, Judge Thomas noted: "In sum, the district court properly construed the Balsers' Action against "The Department of Justice, Office of United States Trustee" as one against the United States. As such, the doctrine of sovereign immunity would apply unless waived by the United States."

The Petitioners (Balsers) disagree with the District and Appellant Court's subsequent interpretation of 11 U.S.C. § 106(a) which clearly states "...sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section...." It appears that these lower courts ignore the conditional phrase to the removal of the US trustee from inclusion in "governmental unit" only as conditioned, and **not** otherwise. 11 U.S.C. § 101(27) states: "governmental unit" means United States;...department, agency, or instrumentality of the United States (but not a United States trustee **while serving as a trustee in a case under this title**)....etc." (emphasis added)

This parenthetical condition has a reversal effect to the meaning assumed by the court below. The plain language statement should mean that the term "governmental unit" always does include the United States Trustee except during those possible brief periods of time when the U.S. Trustee might be required to perform a more judicial related function as

by finding it necessary to "...**serve as trustee in a case under this title**...." When might this happen? The same conditional phrase also appears in the following:

"§ 321(a) A person may serve **as a trustee in a case under this title** only if...."

"§ 321(c) The United States Trustee for the judicial district in which the case is pending is eligible **to serve as trustee in the case** if necessary.

"§ 322(a) ...a person selected **...to serve as trustee in a case under this title** qualifies...."

"§ 322(b)(1) The United States trustee qualifies wherever such trustee **serves as a trustee in a case under this title.**

§ 323. Role and capacity of trustee

(a) The **trustee in a case under this title** is the representative of the estate.

(b) The **trustee in a case under this title** has capacity to sue and be sued.

"§ 1104(d) If the court orders the appointment of a trustee...the United States trustee...shall appoint...one disinterested person other than the United States trustee **to serve as trustee...in the case.**

The Court is asked to note that the most reasonable conclusion to be drawn, in recognition of the application of the phrase "to serve as trustee in a case," plus the prohibition of the U.S. Trustee from ever serving in a Chapter 11 case, firmly supports the conclusion, that § 106(a) does abrogate sovereign immunity for the U.S. Trustee in a Ch 11 case as described therein and as argued by Balsers. Also note § 323(b) specifically provides that the trustee "has capacity to sue and be sued." Balsers contend that when the Examiner was authorized to represent the estate for the closing of the 80% first sale, he became, in effect, authorized "to serve as trustee in a case under this title," in violation of several codes, beyond the protection of his lawful role, and he took on a capacity to be sued. His supervisor should be held accountable, as in

Washington State under its respondeat superior, as being in accordance with "the law of the land."

To further encourage this Court's reversal of the Ninth Circuit's interpretation as to sovereign immunity, please consider the very clear intent of the legislature when it modified the definition of "governmental unit" in the Bankruptcy Judges and United States Trustees Act of 1986. In H. Rpt. 99-764 on H.R. 5316, on Aug 7, 1986, Mr. Rodino is quoted as stating:

"Section 201 amends 11 U.S.C. § 101, the definitional section of the Bankruptcy Code. 11 U.S.C. § 101(15) is amended to include the U.S. trustee as an "entity," and 11 U.S.C. § 101(27) is amended to make it clear that the U.S. trustee is not a governmental unit while serving as a **private** trustee." (emphasis added) "Section 203 amends 11 U.S.C. §321 to make the U.S. trustee eligible to serve as a private trustee only if the U.S. trustee certifies to the court that the U.S. Trustee is unable to locate a qualified disinterested person in the district where the case is pending willing to serve as private trustee. The U.S trustee is not meant to take the place of the private trustee." (Section references updated.)

On a different matter, Footnote number 3 to Section B[4] of the published Opinion comments on Balsers' reference and emphasis to 11 U.S.C. § 1107, and the Appellate Court's corresponding inability to connect this reference to the "Rights, powers, and duties of debtor in possession." The very strong point that Balsers were attempting to make was that the Examiner's authority was expanded to usurp Balsers' property ownership and authority and powers, as described under § 1107, while on the U.S. Trustee's agenda at a hearing called only to defer a U.S. Trustee motion. There was no notice or hearing on this elevation of the Examiner's authority from the prior "limited powers" to the new "private trustee" authority to actually sell and execute all closing documents for 80% of the

Balsers' total remaining assets. This took place while knowing Balsers' counsel had been excused to leave town on an out-of-state vacation, assured by the U.S. Trustee's representative as to the deferment of the single agenda item. The increased authority granted the Examiner, violated the stipulation on which the appointment of the Examiner was first authorized; it violated due process; it violated the notice and hearing statutes; it violated § 1107 and § 1106(b) in that "An Examiner...shall perform...any other duties of the trustee that the court orders the debtor in possession not to perform." No such order ever occurred.

The disaster of the $5,000,000 loss that resulted from this transfer of power and authority also, under § 106(a) made the United States, the Department of Justice, the Office of the United States Trustee, the U. S. Trustee and the Examiner all fully exposed beyond the shield of sovereign immunity. The Balsers contend that when the government took over control of the principal assets of the Chapter 11 cases, it also took on a heightened level of responsibility for exercising due diligence and the handling of operational functions in a fiduciary manner. Its subsequent failure to maintain integrity while exercising this ultimate authority over the Balser estate assets made the associated governmental units "responsible" for the consequences. The manner in which the system was abused fully justifies said parties being held accountable for the adverse consequences of unlawful and unjust acts while so empowered. By violating several codes, rules and reasonable person constraints, the U.S. Trustee and Examiner had stepped outside of any protective shield for such judicial or discretionary acts they may otherwise have had to perform.

The request by the Buyer's counsel, as an officer of the court, to mislead the Court through an informal "by the way, your Honor, while we're here we'd like to have you also authorize the Examiner to complete all the closing processes and signings on the sale you already approved..." was in direct violation of several codes. The informal introduction of such a

request into the U.S. Trustee's agenda should not have been tolerated by the U.S. Trustee, who had excused the Balsers' counsel from attending. In particular, with the resulting extreme $5,000,000 financial loss suffered by the Balsers **and their unsecured creditors**, the misapplication of sovereign and judicial immunity should not be allowed to exonerate those who violated their fiduciary duties and to cover entrapment of the judge into violating constitutional rights and statutory law. Certainly the judge may have abused his authority, but likely only the U.S. Trustee's counsel (Gail Geiger) and the Buyer's counsel (Larry Ream who made the oral request) were genuinely aware of having manipulated the judge's approval inappropriately.

Sovereign immunity should also be waived under the FTCA. Despite the lack of an earlier reference to the FTCA or related cases by the Balsers, certainly the qualifying criteria was well pleaded from the initial complaint forward. The Defense fails to mention immunity for nine months into a case where the initial complaint asks for its waiver, and the Appellant is penalized as a pro se participant for not fully identifying the statutes under which the wrongdoings should be properly charged. The Court might note that the Ninth Circuit Rule 28-1(c) provides: "Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described..." The Informal Brief then asks for claims, issues, and as to "What law supports these issues on appeal? (You may, but need not, refer to cases and statutes.)" Even though the Act was not specifically cited in the Amended Complaint or in the initial pro se appeal, it was certainly well presented in the Appellants' Supplemental Brief. Certainly, in their Amended Complaint filed in this case the Petitioners attested to their "... suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute...." As argued later by appointed counsel in the Appellants' Supplemental Reply Brief:

"*Jurisdiction Exists Under the Federal Tort Claims Act Because the Amended Complaint Alleged Negligence and Violation of Non-Discretionary Duties on the Part of the U.S. Trustee...* because Appellants were *pro se* litigants when they filed their initial and amended complaints, the district court was obligated to "construe the pleadings liberally" and grant Appellants the benefit of any doubt. *Ortez v. Washington,* 88 F.3d 804, 807 (9th Cir. 1996); *Mullis v. United States,* 828 F.2d 1385, 1388 (9th Cir. 1987). As such, Appellants' pleadings in the court below should be read to state a cause of action under the FTCA, even though the Act was not specifically cited in the Amended Complaint."

"In his Response Brief, (Supplemental Brief for the Appellee, pages 10-11), the U.S. Trustee relies on the "discretionary function" exception to the FTCA's explicit Waiver of sovereign immunity to argue that the district court was without jurisdiction under the Act in this case. 28 U.S.C. § 2680(a). This exception provides that no liability shall lie for "[a]ny claim based upon an act or omission of an employee of the Government, *exercising due care...*or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty." 28 U.S.C. § 2680(a). (emphasis added) Whether this particular exception to the FTCA applies is a factual question that should have been resolved at the district court level. Instead, it wasn't even addressed. As noted by other courts, "[t]he determination of whether or not a given act by the United States is discretionary, and so excluded from coverage under the Federal Tort Claims Act is very much a factual issue, depending upon evidentiary circumstances present in each individual case." *Howard Routh & Sons v. United States,* 668 F.2d 454, 456 (10th Cir. 1981); *See also Sumner Peck Ranch v. Bureau of Reclamation,* 823 F. Supp. 715 at 740 (E.D. Cal. 1993) *(citing Prescott v. United States,* 973 F.2d 696, 700, 702 (9th Cir. 1992)) ("In ruling on the

applicability of the [discretionary function] exception, a court must engage in a 'particularized and fact-specific inquiry' in which the government bears the burden of proving its entitlement to immunity.")

"Appellants' Amended Complaint alleged, in essence, that the U.S. Trustee completely failed to supervise the appointed Examiner and failed to investigate complaints of fraud, collusion and wrongdoing in the administration of their bankruptcy estate. Although the U.S. Trustee argues that the alleged conduct falls within the discretionary function exception to the FTCA, this exception is inapplicable to the actions, and inactions, alleged in the Amended Complaint. The U.S. Trustee is statutorily mandated to perform certain functions, and those functions are not discretionary. *See* 28 U.S.C. § 586(a)(1), (3); *see also* 11 U.S.C. § 307. Thus, while the manner in which the Trustee supervises or investigates may involve the exercise of discretion, the duty to supervise and investigate does not. In *Berkovitz v. United States,* the United States Supreme Court stated "[t]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz,* 486 U.S. 531 536 (1988). The Court also stated in *Berkovitz* that "[t]he discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment." *Id.* at 539.

"This Court recognized that *Berkovitz* sets forth a two-step process in determining whether a function is discretionary and, thus, fails within the "discretionary function" exception to the government's otherwise explicit waiver of sovereign immunity. *Ariz. Maint. Co. v. United States,* 864 F.2d 1497, 1501-02 (9th Cir. 1989); *see also Nat'l Union Fire Insur. v. United States,* 115 F.3d 1415, 1421 (9th Cir. 1997). Accordingly, this Court must first examine the conduct's nature and determine whether the government employee had any discretion in performing that conduct. *Ariz. Maint. Co.* 864 F.2d at 1502. This first step

entails an analysis determining whether the conduct is "the product of judgment or choice." *Id.* 'This Court stated that if there were no discretion or choice, there would be no immunity. *Id.* If the Court finds the conduct is discretionary, it must then determine whether the conduct is the type the exception was intended to protect. *Id.* The exception protects only those discretionary functions that are grounded in "social, economic, and political policy." *Id. (citing Berkovitz,* 486 U.S. at 536-37".)

"The district court erred in not allowing any factual development before dismissing the Appellants' lawsuit. First, the district court should have evaluated whether, based on the specific nature of the Trustee's conduct, the actions were discretionary or non-discretionary. Second, the district court should have determined whether the action or conduct was based on some form of policy protected by the exception. The district court did neither. In fact, by granting the Trustee's Motion to Dismiss under Rule 12(b)(6), Fed. R. Civ. P., the court implicitly ruled that the FTCA could not apply under any conceivable set of facts in this case. *See Sumner Peck Ranch,* 823 F. Supp. at 719 *(citing Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)) ('A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.')"

Question 2: Immunity for Non-Compensatory Relief: The Ninth Circuit Judiciary, from the level of the bankruptcy court judge to the en banc of the Court of Appeals, has also concluded that none of the government or private participants shall be held accountable for declaratory, injunctive or damage claims for relief by Balsers. We are petitioning for review by this Court to redress grievances, which have resulted as a consequence of administrative as well as constitutional wrongdoings alleged in this case.

The Amended Complaint filed in the Seattle District Court listed twelve items under Demand for Relief. Five items concerned the payment of damages by the defendants and five were of another nature, including trial by jury; the U.S. Trustee initiation of investigation of fraud, collusion, misrepresentation, obstruction of justice, perjury, and other alleged wrongdoings; and the U.S. Trustee's preparation of "Ch 11 Guidelines" as information handouts to assist debtors, claim holders, officers of the court, and Judges as to what should reasonably be sought under a Ch 11 program.

One of these five items was "...that the Office of the U.S. Trustee take such other remedial action as the Court deems necessary to ultimately effect an award of damages and compensation to Balsers...." This was intended to provide for the Defendants, instead of paying damages, to actually profit by collecting damages, with the Balsers, from the private perpetrators who most benefited from what was effectively an abuse of process and deception of the court as to true values. If the case is remanded to proceed, then discovery may reveal recipients of the $5,000,000 and their relative capacities, whether in government or private business, within the process.

It is clear to Petitioners that the Office of the U.S. Trustee and the Department of Justice could gain additional compensation and provide enhanced caseload services if they are required to implement more considerate, knowledgeable and stringent adherence to existing codes and policies. But when the integrity and diligence of those handling and operating in the bankruptcy process are sacrificed, even by carelessness and for expediency, the system fails and we all become victims and losers.

Question 3: Immunity Waiver, Related Agencies: Sovereign immunity is waived in accordance with 11 U.S.C. § 106(b) for an agency upon the filing of a claim in bankruptcy. The IRS filed claims against all three of the initial involuntary

estates, and continues to the present time to maintain that certain obligations are yet to be satisfied. However, the Petitioners claim that significant overcharges were paid earlier. The IRS paid $9,231.98 to the Balsers in September, 2001. Additional refunds, as well as claims for other years, are yet to be reimbursed or resolved.

Balsers further contend that the Department of Justice and the Treasury should be joined as co-defendants because of their combined authoritative effect upon persuasion of the Court to favor the liquidation of assets in the manner followed. The U.S. Trustee and IRS worked together in their mutually supporting pleadings. The income from the Balsers' payments for both Ch 11 and IRS activities eventually go to the United States as the same parent agency. Furthermore, the attorney representing the IRS and the Office of the U.S. Trustee is the same person, Robert Brouillard.

The management of the estates during the most critical period for conversion of real estate assets to cash was under the guidance of the Department of Justice and the Office of the United States Trustee, as implemented by the U.S. Trustee's assistant counsel and the Examiner. The third principal advisor to the court was Mr. Brouillard, on behalf of the IRS. Clearly, the United States government exercised its joint claims against the estate's funds, and should not enjoy immunity as a consequence.

Question 4: U.S. Trustee Fees as Filed Claims: **U.S.C.** 28 § 1930(a)(6) provides that "...a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury...." Such fees are scaled in proportion to the financial activity for the period over which they are charged and are believed to be used to cover, or at least offset, the operational expenses and salaries for staff and expenses associated with the Office of the U.S. Trustee, including the U.S. Trustee.

Title 11 §106(b) provides that "A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate..." Correspondingly, a proof of claim, although formalized to simplify communications with the majority of creditors, is still defined as a written statement to show the basis and a dollar amount of a claim against an estate. In that respect, both the U.S. Trustee and the IRS can be considered active creditors, with their informal and formal proofs of claims being ongoing and dynamic, and certainly recognized as a high priority obligation of the estate for payment from property of the estate. Similarly, the suit for damages is to recover funds lost as a consequence of the activities of the government agents representing both the Department of Justice and the United States Treasury.

There is another aspect of this quarterly fee obligation. Integrity and responsibility are expected from a compensated service provider, whether in business or from a government agency, along with a guarantee that services will be lawful, timely, professional and protect one from undue risk. Accountability is also expected for errors, omissions and for the direct adverse consequences of the misdeeds of the provider's employees and agents. Without integrity, responsible behavior, or accountability it may be impossible to maintain the public's trust. Balsers expect the Respondents to be held accountable, and intends to take the steps lawfully necessary to ensure the ultimate achievement of that goal. It is hoped that this Court's response will advance Balsers' quest for justice.

Question 5: Defects Effect on Due Process: Amendment I to the U.S. Constitution includes: "...the right of the people... to petition the Government for a redress of grievances." The extent to which the Supreme Court's response results in a just remedy will be the real measure of the value of that phrase in the Constitution.

Amendment V includes: "No person shall...be deprived of...property, without due process of law;" The claims submitted to the Court provided ample support in response to the first motion for dismissal in Seattle District Court, as acknowledged in Judge Marsha Pechman's order executed September 7, 2001, stating : "Plaintiffs' amended complaint, unlike their original complaint, contains allegations of specific conduct and actions taken by the United States Trustee in plaintiffs' bankruptcy proceedings...For this reason, defendants' motion to dismiss is rendered moot by the amended complaint."

The allegations included several instances of actions, which the court or Examiner took without first giving proper notice, nor conduct of hearings, and violations of statutory law. The U.S. Trustee and Examiner failed to follow established procedures in the Ch 11 process by accepting the buyer's limited appraisal at less than normal liquidation value, near $1M. In view of his conflict of interest with the buyer's attorney, the U.S. Trustee should have required the Examiner to order a new MAI appraisal or confirmed one of those already available, ranging from over $5M up to $8M. (The party who purchased directly from the Examiner also acquired the remaining 20% of the project and resold the combined property later at $7.75M, for a gross gain near $5,000,000.)

An unconscionable conclusion is suggested by the inference authored by Judge Thomas in the Published Opinion, on page 34 of the Appendix, at the end of his first paragraph: "...the bankruptcy court approved the sale...on June 6, 1996...denied the debtors' motion for reconsideration on June 20, 1996. The debtors filed a notice of appeal of the order approving the sale. However, *they did not pursue the appeal,* and it was dismissed." (emphasis added)

Omitted is that the appeal was filed on July 1, 1996, being within 10 days of the denial; then carried through the Bankruptcy Appellate Panel, with an intermediate application for a Temporary Restraining Order, which the court refused to grant, and a Lis Pendens, which was mysteriously sequenced by the County between the deed transfer signed by the Examiner for the first 80% sale, and the corresponding lender's deed of trust for a cash-out purchase loan at 1 ½ times the full purchase price. (The title officer later confirmed always submitting for recording in direct sequence; first with the purchase Deed, followed by its corresponding Deed of Trust. However, the date/time stamp on the Lis Pendens original was modified and now shows that recording time between the times on the Deed and Deed of Trust.)

The termination of the appeal was thus forced upon us by the Court. Sixteen months later, and in open hearing on November 5, 1997, when, immediately following the court's order to replace Balsers with a case trustee, we were given our choice between two options: (1) execute a stipulation for order of dismissal and sign all sales and closing documents to the satisfaction of the buyer's attorney, Mr. Ream, and thereafter be reinstated as debtor in possession; OR (2) let the new case trustee: conclude the sale; terminate adverse court proceedings; and revert our corporation, Homewood Development, Inc., back into a Ch 7 with no assets whatsoever, abandoning the remaining 60 unsecured creditors.

What could a fiduciary and entrepreneur do? We chose to surrender in the bankruptcy battle with the U.S. Trustee and Judge, and refocus on amending our Plan of Reorganization. We signed the stipulation and deeded over to the buyer the 20% of remaining properties.

What my wife and I were put through in those few hours on that day in court was an extremely unjust departure from justice and in clear violation of our constitutional rights that

precluded, at least at that time, our possible access to a jury trial as well. We conceded then that we could not successfully pursue a lawsuit adverse to that court, to that U.S. Trustee, or to that buyer while still under the jurisdiction of the same case administrators and judiciary. Such claims would simply have to wait until we were freed from bankruptcy court jurisdiction.

Certainly, we are reluctant to accept the current published Opinion simply stating "they did not pursue the appeal, and it was dismissed." The US Trustee should not have permitted such an outrageous proceeding. So we worked on our Chapter 11 Plan and received the same Judge and U.S. Trustee's confirmation less than 20 months later. The final decree for fully administering the plan was issued within 6 more months on Dec 17, 1999. At that point we finally believed we were free to resume our quest for justice in the federal district court system.

Amendment IX addresses the retention of rights assumed but not defined. The Petitioners read into this the right to expect integrity, responsibility, and accountability into the character of those individuals and agencies with which we must deal. There are new responsibilities imposed, as well as rights being granted with the implementation of laws and regulations under our Constitution. As citizens, we should all be assured of the benefit of protection and opportunities afforded by due process thereunder. Similarly, there are standards of respect and behavior that are new prerequisites to achieving purposes and goals as described in the Preamble to our Constitution.

When an officer of the court misrepresents his client's purposes or values, this constitutional right has been violated. The entire Ch. 11 procedure speaks toward reorganization, not liquidation, but when the U.S. Trustee forced liquidation upon us at our own great sacrifice, this constitutional right for fairness and prudence has been violated. Did I not have a right to expect cooperation, consideration, and support from the

Examiner as provided in our contractual stipulation? Our constitutional right under Amendment IX was seriously offended and violated by the way in which our case was administered. Losses and other damage were suffered as a result. The U.S. Trustee should not have rejected our request for a cooperative investigation when asked. There was no effective response.

Amendment XIV reaffirms our constitutional right to due process and complements our right to equal protection of the laws. The U.S. Trustee, the Examiner and several officers of the Court (being attorneys representing either creditors, the purchasers, or other adverse parties) have actively sought ways to compromise justice, in their own favor. The extent of untrue and misrepresentative manipulation experienced on this one case is shocking. Deception and exaggeration is a standard exceeded only by presumptiveness and arrogance with respect to fact finding. The Ch 11 bankruptcy process itself, as experienced on this case, has become an obstruction of justice. There is actual pain experienced to sit in a courtroom and observe the charade of deceit being transformed into a verdict your heart knows to be unjust. The best immediate antidote to this poison in the United States Courts of law must be in pursuing and implementing "accountability" for justice to become more than a possibility.

Now we find ourselves again frustrated in both the Seattle District Court and the Ninth Circuit Court of Appeals. Both have failed us. The District Court would hold us to schedules, as for further addition of the IRS and another amendment to our complaint as though 5 months were important. What is important is that the Balsers should have been granted 45 days after receipt of Defendant's answer to determine appropriate parties and amendments. Since an answer was never prepared, the original docket schedule should not have been considered a constraint. Balsers do not accept the late motion criticism by a defendant that has refused to provide an answer or to discuss

the merits of the case. The Order Setting Trial should acknowledge and trigger off from both parties first meeting critical deadlines. The significant point is that we suffered a loss in court of $5,000,000 through wrongful actions by government employees. The government should be held accountable, or be forgiven by way of a jury trial.

CRITIQUE OF OPINION: MISSTATEMENTS

The Petitioners have additional concerns with respect to statements as presented in the Opinion. These apply to this Court's interpretation of both general and specific conclusions presented therein, not too dissimilar from the simple reference stating that Petitioners "did not pursue the appeal" as explained above. The above arguments have addressed items in the Opinion Sections II A and B. Section C raises a new perspective for Petitioners. In reference to the assertion that the Court "will not consider an issue raised for the first time on appeal," the concern is how can a pro se citizen get the concerns already raised to even be answered, let alone to be properly addressed? The Ninth Circuit provided their own form for "Appellant's Informal Brief" with instructions that suggested that a simplistic listing of issues would be adequate. No mention was made that the pro se Appellant was required to first establish the applicable standard of review or the legal theory on which jurisdiction must be demonstrated for each issue. The Petitioners believe that "the issues raised" well qualifies under the FTCA scope as described in the Opinion. The Appendix includes a copy of the response to that Court's form, Item 5: "What issues are you raising on appeal?" as presented, and left unanswered, in the Petitioner's original appeal to the Ninth Circuit Court.

A serious issue under the FTCA referred to in the Opinion relates to whether the act or omission complained of is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

agency or an employee of the Government...." 28 U.S.C. § 2680(a). Are violations of statutory law ever part of one's discretionary duty? Is a "governmental unit", such as the U.S. Trustee or Examiner, now to have included in their scope of discretion as to when it is their duty to violate statutory law or to not respect the constitutional rights of debtors, or any of the several acts that may well be criminal if prosecuted? When is perjury a discretionary duty? Except in a corrupt organization when is the clear violation of fiduciary duty an issue of discretion? How many acts that the defense would argue "...does not by itself constitute evidence of fraud," as the U.S. Trustee would excuse as simply another accommodation to facilitate Court approval of an action. Is not the transfer of $5,000,000 from the Balsers to the perpetrators' over the strong objection of the victims, not a factor? Where then, if government and its agents are to be licensed to so act with impunity under the guise of their use of discretion in performing their administrative work, that they become shielded by judicial and qualified immunity, is there to be found accountability for our adverse losses and damages suffered as consequences of their wrongful behavior?

A clear definition of "discretion" is needed for application in this case, as to (1) performing administrative tasks in a prudent, policy-wise, responsible manner without immunity, vs. (2) performing judicial acts that benefit party A vs. party B, after fair hearing and consideration of opposing views and circumstances. Then an appropriate determination of responsibility for wrongdoing needs to be followed with accountability for the consequences of abuse.

The Opinion's reference to *Bivens* is interesting because it further supports the reason that the conditional phrase was intended to make the U.S. Trustee a "governmental unit" **except** when serving as a trustee on a case, as a private trustee. Again, the only time that the U.S. Trustee's responsibility violated the "case trustee" condition was upon the taking over

to dispose of the Debtor in Possession's assets, without hearing or notice or due process. In any event, the State of Washington also has a regulation to provide for "respondeat superior" wherein, even if an employee or agent of the government performs in a manner that deserves redress, and is excused from their own personal liability, then the state stands behind the perpetrator and carries full accountability for the payment of appropriate damages. In this case, the U.S. Trustee, through the office of the Attorney General, may need only to carry accountability to those who most benefited from the abuse of the bankruptcy system. But the government, because of the unlawful proceedings while under its control, should first be held accountable to Balsers. As further attested to by counsel in their earlier reply:

"Bankruptcy trustees owe the duty of care and the duty of loyalty to the estate and its creditors. *See In re Cochise,* 703 F.2d 1339, 1357 (9th Cir. 1983) (discussing a bankruptcy trustee's fiduciary duties to creditors). The U.S. Trustee's statutorily mandated duties resemble the bankruptcy trustee's fiduciary duties. "As Congress has stated, the U.S. Trustees are responsible for 'protecting the public interest and ensuring that bankruptcy cases are conducted according to law.'" *In re Revco D.S., Inc.,* 898 F.2d 498,500 (6th Cir. 1990) *(citing* H. Rep. 595 at 109, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 6070). This statement alone establishes that the Trustee's duties to beneficiaries resemble fiduciary duties of care and loyalty.

"Further, the U.S. Trustee is to serve as a "watchdog" over the bankruptcy estate, *In re Revco,* 898 F.2d at 500. Inherent in this service are the fiduciary duties of care and loyalty to the Trustee's beneficiaries. The Trustee is responsible for ensuring the bankruptcy system is administered efficiently. *In re Castillo,* 297 F.3d 940, 951) (9th Cir. 2002) *(citing* H.R. Rep. No. 95-595, at 4, 100 (1977), *reprinted in* 1978 U.S.C.A.A.N. 5963, 5966, 6061; *See* 28 U.S.C. § 586(a)(3)); see *also* 11

U.S.C. § 307. Since the U.S. Trustee's duties resemble those of a bankruptcy trustee, so must his liability.

"This Court has held that bankruptcy trustees may be held liable for acts of negligence constituting violations of the duty of care, and acts of fraud, which are violations of the duty of loyalty. *In re Cochise,* 703 F.2d at 1357 (9th Cir. 1983), *(citing Mosser v. Darrow,* 341 U.S. 267, 273-74 (1951)); *In re Rollins,* 175 B.R. 69, 74 (Bank]:. E.D. Cal. 1994). The duty of care is defined as the "care and skill "... a man of ordinary prudence would exercise in dealing with his own property." *In re Rollins,* 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994) *(citing* Restatement (Second) of Trusts § 174 (1959)). The court in *Rollins* also expressed that "[a]lthough a mistake of judgment is not a basis to impose liability on a trustee, a failure to meet the standard of care does subject him to liability." *Id. (citing Reich v. Burke (In re Reich),* 54 Bankr. 995, 998 (Bankr. E.D. Mich. 1985)).

"The United States Supreme Court held that "[t]he most effective sanction for good administration [of the bankruptcy system] is personal liability for the consequences of forbidden acts." *Mosser v. Darrow,* 341 U.S. 267, 274 (1951). Although the Court was referring to sanctioning bankruptcy trustees, common sense dictates that because the U.S. Trustee owes its beneficiaries the same duties as a bankruptcy trustee the same sanctions should apply to the U.S. Trustee."

Other arguments presented in the Opinion as to "no equity in the property" are extreme proof of fraud, collusion, conflict of interest, and a number of illegal acts. The misled concurrence of a judge that has been lied to is hardly the justification for the defense of a $5,000,000 swindle. It is unconscionable that both the Judiciary and Justice Departments in the United States of America can allow all these rationalizations while denying the victims, including 60 unsecured creditors, from being granted a jury trial.

Plaintiffs did make a concerted effort to pursue appeals during the case, with no support whatsoever from the U.S. Trustee. We did not "...voluntarily elected to abandon..." any of our efforts to gain justice, but were maneuvered into death struggles at each step. We did try to invoke 11 U.S.C. § 363(n) and got to the same Ninth Circuit Court of Appeals until the bankruptcy judge spontaneously rescued our adversary by appointing a case trustee to remove us from the court room, unless we capitulated and withdrew our appeal with prejudice. Clearly, we had no further recourse in the bankruptcy court, which also violates our sense of both Amendments VII and IX to the U.S. Constitution. (Perhaps the U.S. Trustee was not displeased to see our challenges neutralized, just as the buyer was surely elated.)

One last point. The Opinion, in its last footnote, Appendix page 43, notes: "a reorganization plan was confirmed that did not reserve any claims. The confirmed plan acted as res judicata as to claims that could have been raised in the bankruptcy proceeding, but were not."

However, the Balsers' confirmed Plan of Reorganization carefully approached the same concern for legal rights by stating under its own Article 3:

"The Balsers, ...will pursue viable claims for damages against third parties who caused the liquidation of significant equities in the property of the Debtor at values far less than market. The Balsers intend to retain counsel to pursue such claims and to distribute any award in accordance with this Plan."

And later, Under its Article 5, Proponent's Rights:

"5.1 The Proponent shall have the right to retain accounting and legal counsel; to pursue legal actions, including, without limitation, actions for fraud and breach of fiduciary

duty as if this plan had not been confirmed...may bring any action...."

As earlier explained, there was no action the Balsers could bring while under the jurisdictions of the same US Trustee and Bankruptcy Court Judge. The Balsers had to wait until the Ch 11 cases were closed.

The Petitioners, the Balsers, respectfully request that the Court consider these explanations and answers to the inaccuracies and limited explanations presented in the Ninth Circuit's Opinion and weight the Opinion accordingly.

REASONS FOR GRANTING THE WRIT

The Petitioners respect that the United States Constitution, as interpreted by the Supreme Court of the United States, provides the best possibility and hope for justice under law. Better discretion is critical to the redress of grievances in complex cases wherein a government agency, officer, or agent is intimately involved. The issue raised in this case is whether justice should be sacrificed behind a shield of immunity, despite wrongdoings by the government officers and agents responsible for supervising the reorganization process. Might this Court then prescribe that justice requires the performance of duties with *integrity*; the providing of appropriate leadership adequate to carry *responsibility* as to fiduciary duties; and the ultimate acceptance of *accountability* for adverse consequences brought about by wrongful behavior? The principal reasons for this Court to grant this writ are to:

(a) preserve the integrity of the overall federal judicial system of the United States;

(b) require the Department of Justice and the Office of the United States Trustee to acknowledge their responsibility for the proper conduct of fiduciary duties by officers of the court and agents under their jurisdiction, and in accordance with applicable laws and established procedures;

(c) ensure that both governmental and private accountability for the adverse consequences of tortuous behavior is not shielded by the inappropriate application of any form of immunity, be it sovereign, judicial, absolute, executive or qualified, wherein the facts as to the alleged conduct of officers and/or agents under a responsible authority in violation of clearly established constitutional or statutory rights remain unchallenged.

The loss of $5,000,000 in property transfer taxed receipts represents only a portion of the overall damages suffered by Petitioners through their experience in the federal bankruptcy court. The unjust proceeding in a Chapter 11 reorganization (brought about through an illicit involuntary petition), as applied to the Balsers under the supervision of the Office of the United States Trustee, certainly serves to illustrate the extent to which inattention to fiduciary responsibilities can damage victims. Issues raised in this case also focus attention on the extent to which government officers and agents may require better training, direction, and supervision to ensure a more responsible adherence to codes and regulations.

Surely the action of this Court in dealing with even one incident brought before it will speak to the application of these same principles of integrity, responsibility and accountability throughout the nation. The impact of granting this writ of certiorari directly addresses the need for exercising greater care in the granting of sovereign immunity so as to be consistent with this Court's prior decisions.

CONCLUSIONS

This Court earlier established tests for determining the application of immunity, The lesson taken in the Ninth Circuit seems to be that, in choosing to describe a governmental unit's activity, the need to exercise some level of discretion can be justified sufficient for immunity to cover for any officer's or

agent's misdeeds. With this case the Supreme Court now has the opportunity:

(a) to declare that the integrity of the Court must be respected;

(b) that those who hold the authority for administering powerful controls as fiduciary leaders and officers must also accept responsibility for the consequences of misdeeds performed by their own officers and/or agents; and

(c) that the waiver of immunity will be recognized at the level necessary to ensure that a just accountability will prevail.

Can the Department of Justice not be held accountable for the actions of governmental units and agents it manages? Will the Office of the United States Trustee accept being shielded by a clear misinterpretation of our common language so that a redress of grievances can be denied? Should the District and Appellate Courts be encouraged to allow, and even cover by false immunity for the swindle of $5,000,000 through the manipulation and violation of the bankruptcy system? For those who find these outcomes acceptable, or even tolerable, what then is to become of our United States system of justice?

The Office of United States Trustee has a fiduciary duty to administer cases and protect the integrity and efficient operation of the bankruptcy system. The Trustee should work to preserve, not waste the assets of an estate. Bankruptcy codes and rules should be followed, not ignored as though "too inconvenient". There is a purpose to due process and the violations experienced in this single case, though not unlike many others, must not be allowed to fade into the sea of total corruption.

The Supreme Court has the opportunity in this case to establish, as a case of first impression, the range and limits of sovereign, judicial and qualified immunity as one or more may apply to the several levels of officers and agents within the Office of the United States Trustee and the bankruptcy court

support system. The Balsers should be given the opportunity to develop facts and voice their concerns about the Trustee's lack of loyalty and care and negligent supervision in a court of law. Procedures and case handling needs to be changed to gain greater successes and fewer abuses.

I declare under penalty of perjury that the foregoing is true and correct. Executed initially on the 7th day of October, 2003, and, as amended this 9th day of December, 2003.

Petitioner: Corinne L. Balser

Corinne L. Balser

Petitioner: Richard A. Balser

Richard A. Balser

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 02-35114; D.C. No. CV-00-02127-MJP

OPINION FILED April 29, 2003

RICHARD A. BALSER; CORINNE L. BALSER,
Plaintiffs -Appellants,

v.

DEPARTMENT OF JUSTICE,
Office of the United States Trustee,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington, Marsha J. Pechman, District Judge, Presiding

Argued and Submitted April 11, 2003 -Seattle, Washington

Before: Dorothy W. Nelson, Sidney R. Thomas, Circuit Judges, and Dean D. Pregerson, District Judge*.

Opinion by Judge Thomas

COUNSEL

Catherine G. O'Grady, Kiersten A. Murphy, Anthony R. Montoya, Arizona State University College of Law Civil Practice Clinic, Phoenix, Arizona, attorneys for the appellants.

Robert P. Brouillard, Assistant United States Attorney, Seattle, Washington, attorney for the appellees.

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*The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question, *inter alia,* as to whether sovereign immunity bars a suit filed against a United States trustee acting in his official capacity based on acts conducted within the course and scope of his employment. We hold that it does and affirm the district court.

I

The bankruptcy proceedings were initiated as three involuntary Chapter 7 petitions filed by Carillon Gardens Associates, LLC ("Carillon") against Homewood Development, Inc., Richard A. Balser, and Corrine L. Balser (collectively, "the debtors"). Eventually, the three petitions were administratively consolidated and converted to a Chapter 11 bankruptcy. The debtors thereafter acted as debtors-in-possession. Carillon moved for the appointment of an examiner in the case pursuant to 11 U.S.C. § 1104. The debtors stipulated to the appointment, and the bankruptcy court entered an order authorizing the United States trustee to appoint an examiner with expanded powers pursuant to 11 U.S.C. § 1104(c), including the power and duty to manage the debtors' rental properties and a power concurrent with the debtor to seek approval of sale of the properties subject to Carillon's secured claims. The United States trustee selected Perry Stacks ("Stacks") as the examiner, and the bankruptcy court entered an order approving the appointment after notice and hearing.

Carillon subsequently filed a request for relief from the automatic stay pursuant to 11 U.S.C. § 362(d) for the purpose of foreclosing on its secured claims against the debtors' real property. Shortly thereafter, the examiner filed a motion for approval of a proposed sale of the real property for a purchase price of $1,592,500, free and clear of liens pursuant to 11

U.S.C. § 363. After notice to creditors and all parties in interest, including the debtors, the bankruptcy court entered an order granting Carillon relief from the automatic stay, provided that any foreclosure sales not be conducted earlier than August 23, 1996. The purpose of this was to enable the examiner to complete the sales of the property. The debtors objected to the terms of the sale proposed by the examiner. However, the bankruptcy court approved the sale free and clear of liens on June 6, 1996. The bankruptcy court denied the debtors' motion for reconsideration on June 20, 1996. The debtors filed a notice of appeal of the order approving the sale. However, they did not pursue the appeal, and it was dismissed.

The bankruptcy court approved the debtors' joint plan of reorganization on June 22, 1999, and the Chapter 11 cases were closed on December 17, 1999.

On August 10, 2000, Richard and Connie Balser ("the Balsers") contacted the Assistant United States trustee who had been assigned the debtors' case and complained about the examiner's conduct in the Chapter 11 cases. The Assistant United States trustee commenced an investigation and ultimately determined that there had been no evidence of fraud or other wrongdoing to require further action and so advised the Balsers. The Balsers then filed this *pro se* action on December 19, 2000, alleging that the United States trustee had acted negligently and fraudulently in connection with the appointment and supervision of the examiner. Specifically, the Balsers allege that two sales involving ten properties were conducted in a negligent and unlawful manner, which resulted in the sale of ten properties significantly below market value and without notice to the Balsers. In particular, the Balsers allege that examiner Stacks fraudulently collaborated with attorney Lawrence Ream ("Ream"), who served as the property buyer's attorney, even though he had a prior and existing business relationship with Stacks in which Ream provided legal representation and services to Stacks. The Balsers allege

that the United States knew of the conflict of interest and fraudulent conduct, but it failed to follow its statutory duty to supervise the administration of Balsers' estate in a manner that protected the Balsers' interests.

The Balsers further asserted that the United States trustee's conduct violated their federal constitutional rights set forth in the Fifth, Seventh, Ninth, and Fourteenth Amendments. The Balsers sought injunctive and monetary relief, including a claim for approximately $5,000,000 in damages.

After first providing the Balsers with the opportunity to amend their complaint, the district court dismissed the complaint on the basis that the United States trustee is immune from suit under the doctrine of sovereign immunity. The district court also concluded that if the suit had been brought against the United States trustee in his individual capacity, it would be barred by judicial immunity. The Balsers timely appealed.[1]

II

A

[1] The United States, as a sovereign, is immune from suit unless it has waived its immunity. *See Dep 't of Army v. Blue Fox, Inc.,* 525 U.S. 255, 260 (1999); *U.S. v. Mitchell,* 445 U.S. 535,538 (1980). A court lacks subject matter jurisdiction over a claim against the United States if it has not consented to be sued on that claim. *See McCarthy v. U.S.,* 850 F.2d 558, 560

[1]On appeal, the Balsers were represented *pro bono* by the Arizona State University College of Law Civil Practice Clinic. The Court wishes to express its appreciation to Arizona State University for the excellent representation, briefing, and oral argument given by the student advocates.

(9th Cir. 1988). "When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *U.S.* v. *Mottaz,* 476 U.S. 834, 841 (1986) (citing *U.S .v. Sherwood,* 312 U.S. 584, 586 (1941)). In sovereign immunity analysis, any lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States. *See Sierra Club v. Whitman,* 268 F.3d 898, 901 (9th Cir. 2001).

In this case, the Balsers sued "The Department of Justice, Office of United States Trustee," which the Balsers now ask us to construe as an action against the United States trustee. However captioned, the suit plainly states a cause of action against the United States. The Department of Justice is undisputably an agency of the United States. *See* 28 U.S.C. § 501. The Office of United States Trustee is under the supervision of the United States Attorney General. *Sec,* 28 U.S.C. § 581 Ca) & Cc). The Attorney General of the United States is empowered to appoint United States trustees for each federal judicial district. *Id.* The term of the appointment is five years. *See* 28 U.S.C. § 581(b). Subject to certain restrictions that are not important to this analysis, the Attorney General fixes the annual salaries of United States trustees and assistant United States trustees. *See* 28 U.S.C. § 587. The United States trustee system is funded by the federal treasury by virtue of special fees collected in bankruptcy cases. See 28 U.S.C. § 589a(b).

In sum, the district court properly construed the Balsers' action against "The Department of Justice, Office of United States Trustee" as one against the United States. As such, the doctrine of sovereign immunity would apply unless waived by the United States.

B

[2] A waiver of sovereign immunity by the United States must be expressed unequivocally. *See U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992). As a general matter, purported statutory waivers of sovereign immunity are not to be liberally construed. *Id.* at 34.

[3] The Balsers argue that the Bankruptcy Code provides an express waiver of sovereign immunity for suits against United States trustees in 11 U.S.C. §106(a). A close examination of the Code refutes this suggestion. Section 106(a) contains a waiver of sovereign immunity as to "a governmental unit." The phrase "governmental unit" is defined in 11 U.S.C. § 101 (27) as follows:

"governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the UnitedStates *(but not a United States trustee while serving as a trustee in a case under this title),* a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

Id. (emphasis supplied).

[4] Thus, by its plain terms, tile Bankruptcy Code does not contain an unequivocally express waiver of sovereign immunity for United States trustees. To the contrary, United States trustees expressly are excepted from the § 106(a) sovereign immunity waiver.[2] Thus, the Balsers' argument fails.[3]

C

The Balsers argue, in the alternative, that the Federal Tort Claims Act ("FTCA") provides an avenue of relief. *See* 28 U.S.C. §§ 1346(b), 2671-80. The FTCA grants a limited waiver of sovereign immunity by making the United States liable to the same extent as a private person for certain torts of federal

employees acting within the scope of their employment. *See* 28 U.S.C. §§ 1346(b)(1), 2674. The Balsers neither asserted this theory of liability in their pleadings nor requested that the district court grant leave to amend their complaint to assert this theory. On appeal, the Balsers request us to reverse the district court and require the district court to allow an amendment asserting this theory.

Generally speaking, we "will not consider an issue raised for the first time on appeal." *US. v. Robinson,* 20 F.3d 1030, I032 (9th Cir. 1994). Further, because the plaintiff is the absolute master of what jurisdiction it invokes, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharm. Inc. v. Thompson,* 478 U.S. 804, 809 n.6 (1986).

These doctrines caution against the relief the Balsers seek, and even if they did not control the instant circumstances, the dispositive fact is that such an amendment would be futile. A suit under the FTCA is not available when the act or omission complained of is "based upon the exercise or performance or the failure to exercise or performance a discretionary function or duty on the part of a federal agency or an employee of the Government .... "28 U.S.C. § 2680(a). The Balsers' entire theory is founded on the United States trustee's alleged negligence in his general duties of selecting, monitoring, and investigating the examiner appointed in this case. As a matter of law, these are quintessentially acts of

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[2]The remedies provided by the Bankruptcy Code against the United States trustee are remedial in nature and to be conducted within the bankruptcy case. *See* Fed. R. Bankr. P. 2020.

[3]The Balsers cite other provisions of the Bankruptcy Code referenced by § 106(a), emphasizing 11 U.S.C. § 1107. However, there is nothing in § 1107 that contains a waiver of sovereign immunity as to United States trustees. Indeed, that provision only references the rights, duties, and powers of a debtor-in-possession.

discretion within the meaning of the FTCA discretionary function exception. *See Richman v. Straley* 48 F.3d 1139, 1146-47 (10th Cir. 1995); *Cf. Joelson v. U.S.,* 86 F.3d 1413, 1419 (9th Cir. 1996) (noting that the relevant statutes guiding the United States trustee were broadly drawn and involved duties committed to the discretion of the United States trustee). Thus, even assuming a cause of action under the FTCA might be available under the instant circumstances (an issue on which we do not opine), allowing an amendment to the pleadings would be futile. Therefore, the Balsers are not entitled to appellate relief on this basis.

III

[5] The Balsers also allege that the United States trustee is liable for committing violations of the United States Constitution pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).[4] Of course, to the extent that the Balsers are asserting a *Bivens* action, their claim does not abridge sovereign immunity because a *Bivens* suit is against a federal employee "in his individual rather than official capacity." *Holloman v. Watt,* 708 F.2d 1399, 1401 (9th Cir. 1983). The existence of a *Bivens* claim therefore does not state a viable cause of action against the United States trustee acting in his official capacity.

The basis of a *Bivens* action is some illegal or inappropriate conduct on the part of a federal official or agent that violates a clearly established constitutional right. *See Davis v. Pass-man,*

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[4]The pleadings do not name the trustee individually, as required in a *Bivens* action. However, the Balsers seek leave to amend to name the correct parties. Because such an amendment would be futile, as discussed in this section, we need not reach the question of whether the district court should have allowed substitution of parties.

442 U.S. 228, 241-44 (1979). The district court held that the Balsers' *Bivens* claim was barred by the doctrine of judicial immunity. *See Butz v. Economou,* 438 U.S. 478, 511 (1978).

[6] We previously have extended private bankruptcy trustees quasi-judicial immunity for "actions that are functionally comparable to those of judges, i.e., those functions that involve discretionary judgment." *Curry v. Castillo (In re Castitlo),* 297 F.3d 940, 947 (9th Cir. 2002); *see also Lonneker Farms, Inc. v. Klobucher,* 804 F.2d 1096, 1097 (9th Cir. 1986) (holding that "a trustee in bankruptcy... is entitled to derived judicial immunity because he is performing an integral part of the judicial process"). We have not had the occasion to consider whether judicial or quasi-judicial immunity covers the conduct undertaken by United States trustees. To determine whether such an immunity applies, we must examine the functions that a United States trustee performs, analyzed in their historic context. *See Antoine v. Byers & Anderson. Inc.,* 508 U.S. 429, 432 (1993).

The office of United States trustee was created by The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat.

3088 (1986).[5] "The primary purpose behind the creation of the office of United States trustee [was] to remove the bankruptcy courts from the administration of bankruptcy cases." H. R. Rep. No. 95-595, at 113 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6074. In general, the United States trustee is charged with the duty to supervise the administration of cases and trustees in bankruptcy cases commenced under Chapters 7, 11, and 13 of the Bankruptcy Code. *See* 28 U.S.C. § 586(a)(3). Although one of the primary functions of the United States trustee is to maintain and supervise a panel of private trustees,

see 28 U.S.C. § 586(a)(1), a United States trustee may also serve and perform the duties of a private trustee under certain circumstances. *See* 28 U.S.C. § 586(a)(2). In short, the United States trustee performs many of the functions that had been assigned previously to the bankruptcy judge.

[7] As we noted in *Curry,* the bankruptcy system historically has been comprised of both administrative and judicial functions, administered by the courts. 297 F.3d at 949-52. Nonetheless, we reasoned that the discretionary acts of a private trustee were protected by quasi-judicial immunity, because some "acts [in bankruptcy proceedings] which taken out of context would appear ministerial. . . are actually part of the judicial function." *Id.* at 952. Here, the relevant question is whether such immunity should extend to acts and conduct undertaken by United States trustees in their course of employment. In light of the fact that United States trustees assume the judicial functions historically vested in bankruptcy and district courts, the actions of the United States trustees logically must be cloaked in the same immunity.

The Balsers contend that some of the actions taken by the United States trustee were those of a private trustee. As an initial matter, such assertion is belied by the record: The Balsers at least initially served as debtors-in-possession in the Chapter 11 proceedings, and there is no evidence that the United States trustee ever assumed the role of private trustee in the proceedings. Nonetheless, even if the record supported the Balsers' contention, such a fact would not alter whether the United States trustee is entitled to immunity. Even if a United States trustee performs the duties of a private trustee, the United States trustee must necessarily receive the immunity

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[5]The United States trustee system was introduced by the Bankruptcy Reform Act of I978 as an experimental pilot project to be implemented in eighteen judicial districts. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

that attaches to actions undertaken by private trustees. *Curry,* 297 F.3d at 943.

Further, it is important to note that most of the acts that the Balsers allege were unlawful (such as the appointment of the Examiner and the sale of the properties) were approved by the bankruptcy court. To the extent that the Balsers' claims allege failure of the United States trustee to assert a specified position in the bankruptcy court proceedings, those claims are barred by the *Noerr-Pennington* doctrine, which "protects advocacy before all branches of government." *Kottle v. NW Kidney Centers,* 146 F.3d 1056, 1060 (9th Cir. 1998); *see also United Mine Workers v. Pennington,* 381 U.S. 657, 669-70 (1965); *E. RR Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137 (1961).

In addition, the consequence of the bankruptcy court approval of the sales is that the Balsers' constitutional rights were addressed and satisfied in the bankruptcy proceedings. The constitutional right upon which the Balsers base their claim is the Fifth Amendment right not to be deprived of property without due process of law. The bankruptcy court, upon motion of a creditor, first determined that the Balsers had no equity interest in the property that is the subject of the litigation, and then authorized the examiner to sell during a limited period before the automatic stay was lifted. The proposed sales were presented to the bankruptcy court and approved after a notice and a hearing. The Balsers presented their objections to some of the sales to the bankruptcy court. This process is designed to, and in this case did, protect the Balsers' constitutional rights under the Fifth Amendment.[6] *See, e.g.,* 11 U.S.C. §§ 361, 363(k).

[8] For all of these reasons, the district court correctly dismissed the Balsers' *Bivens* claims against the United States trustee.

IV

The Balsers also claim in supplemental briefing that the district court erred in denying them leave to amend to add additional parties. The Balsers do not express any legal basis for reversing the decision of the district court other than the liberality generally afforded *pro se* litigants. "Issues not raised in the opening brief usually are deemed waived." *Dilley v. Gunn,* 64 F.3d 1365, 1367 (9th Cir. 1995). Given the district court's careful treatment and allowance of prior amendments, we see no reason to exercise our discretion to entertain this new issue not raised in the opening brief.

AFFIRMED.

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[6]Their immediate remedy was to appeal the decision of the bankruptcy court and obtain a stay of the sale. They voluntarily elected to abandon their appeal. Further, if the Balsers suspected a collusion in the sales, presumably they could have pursued a remedy in the bankruptcy proceedings as debtors in possession under 11 U.S.C. § 363(n). They failed to do so. Rather, a reorganization plan was confirmed that did not reserve any claims. The confirmed plan acted as res judicata as to claims that could have been raised in the bankruptcy proceeding, but were not. *See Trulis v. Barton,* 107 F.3d 685, 69t (9fh Cir. I995); *Lawrence Tractor* Co. v. *Gregory (In re Gregory),* 705 F.2d [118, 1121 (9th Cir. 1983).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 02-35114; D.C. NO. CV-00-02127-MJP

ORDER
NOT FOR PUBLICATION

FILED July 9, 2003
Cathy A. Catterson,
Clerk U.S. Court of Appeals

RICHARD A. BALSER; CORINNE L. BALSER,
Plaintiffs - Appellants,

v.

DEPARTMENT OF JUSTICE,
Office of the United States Trustee,
Defendants – Appellees.

Before: D.W. NELSON, THOMAS, Circuit Judges,
and PREGERSON, District Judge.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. The motion to withdraw as attorney of record for the appellant filed by Civil Practice Clinic is granted.

*The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 02-35114; CT/AG#: CB-00-02127-MJP

JUDGMENT

FILED and ENTERED
April 29, 2003

RICHARD A. BALSER; CORINNE L. BALSER
Plaintiffs - Appellants

v.

DEPARTMENT OF JUSTICE,
Office of the United States Trustee
Defendants – Appellees.

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 02-35114; D.C. No. CV-00-02127-MJP
Western District of Washington, Seattle

ORDER FILED October 30, 2002

RICHARD A BALSER, et al., Plaintiffs – Appellants,

v.

DEPARTMENT OF JUSTICE, Office of the
United States Trustee, Defendants – Appellees.

Pursuant to this court's August 19, 2002 order appointing pro bono counsel for appellant, Catherine G. O'Grady, Esq. and the Arizona State University College of Law are hereby appointed to represent appellant in this appeal. If appellant does not object to this order, appellant shall complete and return the enclosed consent form within 14 days from the date of entry of this order. The Clerk shall amend the record to reflect that Catherine G. O'Grady, Esq. and the Arizona State University College of Law, P.O. Box 877906, Tempe, Arizona 85287-7906, (480) 965-2847 are the counsel of record for appellant in this appeal. This Order shall be served on appellant as well as counsel for appellant.

Supplemental briefing shall proceed as follows: appellant's supplemental opening brief is due December 13, 2002; appellee's supplemental answering brief is due January 13, 2003; and appellant's optional supplemental reply brief is due February 3, 2003. This appeal shall be calendared for oral argument in Seattle, Washington on the April 2003 calendar.

For the Court:
Julie M. Ronken, Deputy
Local Rule 27-7

CATHY A. CATTERSON
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 02-35114; D.C. No CV-00-02127-MJP
Western District of Washington, Seattle

ORDER

FILED August 19, 2002

RICHARD A. BALSER, et al.,
Plaintiffs – Appellants,

v.

DEPARTMENT OF JUSTICE,
Office of the United States Trustee,
Defendant - Appellee.

Before: Peter L. Shaw, Appellate Commissioner

Upon review of the record and the briefing in this appeal, this court has determined that the appointment of *pro bono* counsel in this appeal would benefit the court's review. The court by this order expresses no opinion as to the merits of this appeal. The Clerk shall enter an order appointing pro bono counsel to represent appellants for purposes of this appeal only. Pro bono counsel shall prepare supplemental briefing that will be submitted, along with appellants' brief, to the judges deciding this appeal and shall appear at oral argument. The Clerk shall establish a supplemental briefing schedule. The appeal is stayed pending further order.

If appellants object to the court's appointment of counsel in this appeal, appellants shall file a written objection within 14 days from the date of entry of this order.

General Order 6.3 (e)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
No. C00-2127P

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

FILED December 20, 2001
At Seattle Clerk U.S. District Court
Western District of Washington By Deputy

RICHARD A. BALSER and CORINNE L. BALSER, husband and wife,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE UNITED STATES TRUSTEE,

Defendant.

Plaintiffs filed a Motion for Reconsideration of the Court's dismissal of their cause of action regarding the handling of their estate in bankruptcy. (Dkt. No. 44). They allege that the Office of the Trustee and more particularly persons "under their jurisdiction," engaged in fraud and other actions which go beyond mere "mismanagement," as this Court phrased the allegations in its stipulation used by the bankruptcy court to appoint an Examiner with limited powers. Plaintiffs, however, fail to pass jurisdictional and immunity bars to their suit, and their Motion for Reconsideration is DENIED.

None of the arguments advanced by Plaintiffs change the Court's prior reasoning that the amended complaint fails to

state a cause of action, as it is plead under 42 U.S.C. § 1983 and 28 U.S.C. § 1491. Plaintiffs have not provided the Court with legal authority or direction on their novel "implied contract" claim, which the Court is not convinced would fall under the provisions of 28 U.S.C. § 1491. Neither is the Court persuaded that the 1994 amendments so significantly alter sovereign and judicial immunity so as to allow Plaintiffs lawsuit. Plaintiff has a high burden to show waiver or abrogation by the federal government. See United States v. King, 395 U.S. 1, 3-4 (1969); McMahon v. United States, 342 U.S. 25, 27 (1951). The 1994 amendments were passed to overrule two Supreme Court cases, not to abolish of the doctrine of sovereign or judicial immunity, but rather to enable courts, particularly bankruptcy courts, to effect orders against government units. See, e.g., Daniel R. Cowans, Bankruptcy Law & Practice, § 3.25 at 434 n.1437; 11 U.S.C. § 106(a)(3). Consequently, pre-1994 cases still inform an analysis of sovereign and judicial immunity, and serious doubts remain regarding the ability of the Plaintiffs to sue the Office of the U.S. Trustee for money damages. Plaintiffs' Motion for Reconsideration is therefore DENIED.

The Clerk is directed to send copies of this order to all counsel of record.

Dated this 20 day of December, 2001.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
CASE NO. C00-2127P

JUDGMENT IN A CIVIL CASE

FILED November 21, 2001
At Seattle Clerk U.S. District Court
Western District of Washington By Deputy

RICHARD A. BALSER and CORINNE L. BALSER,
husband and wife
Plaintiffs,
v

UNITED STATES DEPARTMENT OF JUSTICE,
OFFICE OF THE UNITED STATES TRUSTEE,
Defendant.

___ **Jury verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__xx__ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Defendant's Motion to Dismiss is granted, and the action is dismissed without prejudice.

Dated: 11/21/01 BRUCE RIFKIN, Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
No. C00-2127P

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

FILED and ENTERED November 21, 2001
At Seattle Clerk U.S. District Court
Western District of Washington By Deputy

RICHARD A. BALSER and CORINNE L. BALSER,
husband and wife,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
OFFICE OF THE UNITED STATES TRUSTEE
Defendant.

This matter comes before the Court on Defendant's Motion to Dismiss. (Dkt. No. 24). The pro se Plaintiffs filed suit against the Office of the United States Trustee, alleging mismanagement of their estate in bankruptcy, under 42 U.S.C. § 1983 and § 28 U.S.C. 1491. Although not challenged by the Defendant, neither of these statutes grants jurisdiction. Plaintiff should have pled civil rights claims under Bivens, not § 1983, as a federal defendant is named. See Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Neither is there jurisdiction under § 1491, which addresses the jurisdiction of the Federal Court of Claims and matters involving bids for federal

contracts and awards. 28 U.S.C. § 1491(a), (b) (2001). Nonetheless, even were the Court to construe the complaint as a *Bivens* action, Plaintiffs case fails.

Recognizing that the pleadings of pro se litigants are liberally construed, and that pro se plaintiffs be given the opportunity to amend their complaint to overcome deficiencies, this Court previously allowed the Plaintiffs to amend their complaint in order to survive a preliminary motion to dismiss. See, e.g. Eldridge v. Block, 832 F.2d 1132, 1135-37 (9th Cir. 1987). Plaintiffs continue, however, to sue only the office o the United States Trustee, without naming any individual defendants. The Office of the Trustee itself, and the Trustee if sued in his or her official capacity, is immune from suit under the doctrine of sovereign immunity. See United States v. Sherwood, 312 U.S. 584, *586* (1941); Howard v. Leonard 101 B.R. 42I, 422 (D.N.J. 1989). Even were the Court to construe the Plaintiffs' pleadings to infer a suit against the Trustee individually, the Trustee would be protected from liability for the alleged actions of business mismanagement by judicial immunity. Howard, 101 B.R. at 423; Bennett v. Williams, 87 B.R. 122, 123-124 (S.D. Cal. 1988), aff'd, 892 F.2d 822 (9th Cir. 1989). Defendant's Motion to Dismiss is GRANTED, and the Court hereby DISMISSES the claims against the United States Trustee without prejudice.

The Clerk is directed to send copies of this order to all counsel of record.

Filed and entered this 21 day of November, 2001.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
No. C00-2127P

ORDER DENYING PLAINTIFFS' MOTION TO JOIN ADDITIONAL PARTIES AND TO AMEND THE AMENDED COMPLAINT

FILED and ENTERED November 21, 2001
At Seattle Clerk U.S. District Court
Western District of Washington By Deputy

RICHARD A. BALSER and CORINNE L. BALSER,
husband and wife, Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
OFFICE OF THE UNITED STATES TRUSTEE
Defendant.

This matter comes before the Court on Plaintiffs' motion to join as Defendants the IRS and the U.S. Department of the Treasury and, as an additional Plaintiff, Homewood Development Inc. (Dkt. No. 32). Plaintiff submits a second amended complaint in order to include the claims raised by joining these additional parties.

This Court set a deadline to join additional parties of May 9, 2001. (Dkt. No. 6). Plaintiffs' motion to join additional parties was flied on October 25, 2001. The Court hereby

DENIES Plaintiff's motion to join additional parties as untimely. Since the amendment to the amended complaint simply effected the joinder of these parties, the Court also DENIES Plaintiffs permission to amend their complaint.

The Clerk is directed to send copies of this order to all counsel of record.

Filed and entered this 21st day of November, 2001.

Marsha J. Pechman
United States District Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
No. 95-04800; No. 95-04802 (Consolidated)

ORDER ON FINAL DECREE

FILED
December 17, 1999
Honorable Samuel J. Steiner
Chapter 11

In re:
HOMEWOOD DEVELOPMENT, INC.
RICHARD AND CORINNE BALSER,

Debtors.

THIS MATTER came for hearing before the court on the U.S. Trustee's Motion to Compel Debtor to Pay Quarterly Fees and File Post Confirmation Reports, or for Entry of Final Decree. The court, deeming itself duly advised in the premises; now, therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: The court having determined that the plan of reorganization confirmed by this court has been fully administered, the Chapter 11 case of Homewood Development, Inc., and Richard and Corinne Balser, shall be and hereby are closed.

DATED this 17th day of December, 1999.

S/n SAMUEL J. STEINER
UNITED STATES BANKRUPTCY JUDGE

Presented by:
JAN SAMUEL OSTROVSKY
U.S. Trustee
s/n Gail B. Geiger
Gail B. Geiger, WSBA#14432
Attorney for U.S. Trustee

CONSTITUTIONAL PROVISIONS

Article III, Section 2

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States...—to Controversies to which the United States shall be a Party;...the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact...."

Amendment I [1791]

"Congress shall make no law... abridging... the right of the people...to petition the Government for a redress of grievances."

Amendment V [1791]

"No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VII [1791]

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

Amendment IX [1791]

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment XIV [1868], Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

11 U.S.C. § 101(14)

"'disinterested person' means person that... (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor... or for any other reason."

11 U.S.C. § 101(15)

"'entity' includes person, estate, trust, governmental unit, and United States trustee;"

11 U.S.C. § 101(27)

"'governmental unit' means United States;... department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title)...."

11 U.S.C. § 106(a)

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 108, etc.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery...."

11 U.S.C. § 106(b)

"A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with

respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose."

11 U.S.C. § 307

"The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title."

11 U.S.C. § 321(a)

"A person may serve as trustee in a case under this title only if such person is-

(1) an individual that is competent to perform the duties of trustee and, in a case under chapter 7, 12, or 13 of this title, resides or has an office in the judicial district within which the case is pending, or in any judicial district adjacent to such district; or

(2) a corporation authorized by such corporation's charter or bylaws to act as trustee, and, in a case under chapter 7, 12, or 13 of this title, having an office in at least one of such districts."

11 U.S.C. § 321(b)

"A person that has served as an examiner in the case may not serve as trustee in the case."

11 U.S.C. § 321(c)

"The United States trustee for the judicial district in which the case is pending is eligible to serve as trustee in the case if necessary."

11 U.S.C. § 322(a)

"Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title

qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties."

11 U.S.C. § 322(b)(1)

"The United States trustee qualifies wherever such trustee serves as trustee in a case under this title."

11 U.S.C. § 323(a)

"The trustee in a case under this title is the representative of the estate."

11 U.S.C. § 323(b)

"The trustee in a case under this title has capacity to sue and be sued."

11 U.S.C. § 363(n)

"The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection."

11 U.S.C. § 1104(d)

"If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one

disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case."

11 U.S.C. § 1106(b)

"An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform."

11 U.S.C. § 1107(a)

"Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."

28 U.S.C. § 586(a)

"Each United States trustee, within the region for which such United States trustee is appointed, shall—

(1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;

(2) serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;

(3) supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11 by, whenever the United States trustee considers it to be appropriate—...

(B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;...

(F) notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;

(G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress; and

(H) monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications...."

28 U.S.C. § 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 U.S.C. § 1930(a)

"Notwithstanding section 1915 of this title, the parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

(6) In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. The fee shall be $250 for each quarter in which disbursements total less than $15,000; $... for each quarter in which disbursements total $... or more but less than $...; The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed."

28 U.S.C. § 2680(a)

"Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Ninth Circuit Rule 28-1(c)

"Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph. If an appellant uses the informal brief form, the optional reply brief need not comply with the technical requirements of FRAP 28(c) or 32(a)."

Rule of Civil Procedure 12(b)(6)

"failure to state a claim upon which relief can be granted…if…to dismiss…shall be treated …as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

(2)

Supreme Court, U.S.
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No. 03-984

In the Supreme Court of the United States

RICHARD A. BALSER AND CORINNE L. BALSER,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE AND
OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' suit against the Department of Justice and the Office of the United States Trustee for monetary damages and equitable relief arising from a closed bankruptcy proceeding is barred by sovereign immunity.

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In the Supreme Court of the United States

No. 03-984

RICHARD A. BALSER AND CORINNE L. BALSER,
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v.

UNITED STATES DEPARTMENT OF JUSTICE AND
OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-43) is reported at 327 F.3d 903. The opinion of the district court granting the motion to dismiss (Pet. App. 51-52) and the order of the district court denying reconsideration (Pet. App. 48-49) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 29, 2003. A petition for rehearing was denied on July 9, 2003 (Pet. App. 44). The petition for a writ of certiorari was filed on October 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress established the United States Trustee Program to improve the administration of bankruptcy cases. See 11 U.S.C. 1104. Twenty-one United States Trustees oversee bankruptcy cases within specified geographic areas. 28 U.S.C. 581(a). To remove any appearance of bias, Congress provided that the United States Trustees would not operate under the direct supervision of the bankruptcy court. Instead, the Trustees are "executives of the bankruptcy network," responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." H.R. Rep. No. 595, 95th Cong., 2d Sess. 88-99, 109-110 (1977). As such, the United States Trustees hold a status that Congress compared to that of a prosecutor. *Id.* at 110; see *id.* at 88 (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena"). The United States Trustees are Justice Department officials and are appointed by the Attorney General. 28 U.S.C. 581-589. They "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307.

2. A creditor initiated involuntary bankruptcy proceedings against petitioners, which subsequently were converted into a voluntary Chapter 11 reorganization proceeding. See 11 U.S.C. 1101 *et seq.* During that proceeding, petitioners stipulated to the entry of an order by the bankruptcy court directing the United States Trustee to select an examiner under 11 U.S.C. 1104(d), who would have the power to manage the petitioners' real properties and to seek approval of their sale. Pet. App. 33; see also 11 U.S.C. 1106(b)

(specifying an examiner's duties). The United States Trustee nominated an examiner and, after notice and a hearing, the bankruptcy court approved the appointment, pursuant to 11 U.S.C. 1104(d). See Pet. App. 33.

The creditor subsequently sought relief from the automatic stay, under 11 U.S.C. 362(d), so that it could foreclose on its secured claims against petitioners' real property. The examiner filed a motion seeking approval of the sale of the real property for $1,592,500, free and clear of all liens, pursuant to 11 U.S.C. 363. After notice to all creditors and parties in interest, the bankruptcy court granted the creditor's motion and approved the sale of the real property. Pet. App. 33-34. The bankruptcy court overruled petitioners' objection to the terms of the sale. *Id.* at 34. Petitioners filed a notice of appeal from the bankruptcy court's order, but they failed to prosecute their appeal, resulting in its dismissal. *Ibid.* Three years later, the bankruptcy court approved petitioners' plan for reorganization and the bankruptcy proceeding was closed. *Id.* at 34, 55.

Eight months after the bankruptcy proceeding closed, petitioners contacted the United States Trustee to complain about the examiner's conduct in selling their real property. Pet. App. 34. The United States Trustee conducted an investigation and found no evidence of fraud or other wrongdoing.

3. Petitioners filed suit, pro se, in federal district court against the United States Department of Justice and the Office of the United States Trustee, alleging that the United States Trustee had "acted negligently and fraudulently in connection with the appointment and supervision of the examiner." Pet. App. 34. More specifically, petitioners' amended complaint alleged that the examiner had colluded with the buyer's

attorney and had sold the properties at below market value. *Ibid.* The complaint further asserted that the United States Trustee knew of the alleged conflict of interest and fraudulent conduct but nevertheless "failed to follow its statutory duty to supervise the administration of [petitioners'] estate in a manner that protected the [petitioners'] interests." *Id.* at 35. Petitioners also asserted violations of their Fifth, Seventh, Ninth, and Fourteenth Amendment rights. Petitioners seek injunctive relief and $5 million in damages. *Ibid.* The complaint did not name the buyer, examiner, or any individual government official as a defendant.

After allowing petitioners to amend their complaint, the district court granted the government's motion to dismiss. Pet. App. 51-52. The court held that the Department of Justice and the Office of the United States Trustee were immune from suit under established principles of sovereign immunity. *Id.* at 52. The court further held that, "[e]ven were the Court to construe [petitioners'] pleadings to infer a suit against the Trustee individually, the Trustee would be protected from liability for the alleged actions of business mismanagement by judicial immunity." *Ibid.*

4. A unanimous court of appeals affirmed. Pet. App. 32-43. The court first held that petitioners' complaint "plainly states a cause of action against the United States" only. *Id.* at 36. The court then rejected petitioners' argument that Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a), waived the United States' sovereign immunity from a civil suit for damages and injunctive relief. The court of appeals recognized that Section 106(a) expressly waives sovereign immunity for "governmental unit[s]" involved in certain proceedings under the Bankruptcy Code. Pet. App. 37. But, the court emphasized, the Bankruptcy Code exempts "a

United States trustee while serving as a trustee in a case under this title" from that waiver of immunity. *Ibid.* (quoting 11 U.S.C. 101(27)).

The court of appeals also rejected petitioners' contention that the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, provides the necessary waiver of sovereign immunity. The court noted first that petitioners had not invoked the Federal Tort Claims Act in the district court and thus had waived that argument. Pet. App. 37-38. The court further held that, in any event, any claim under the Federal Tort Claims Act would implicate "quintessentially acts of discretion within the meaning of the [Federal Tort Claims Act's] discretionary function exception." *Id.* at 38-39.

The court found petitioners' reliance on *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to be unavailing for two reasons. First, petitioners had failed to name any government official in his individual capacity as a defendant. Pet. App. 39 & n.4. Second, the court held that any claim under *Bivens* would have been futile because the United States Trustee would have been entitled to absolute judicial immunity for his actions. *Id.* at 41. In so holding, the court reasoned that the United States Trustee had "assume[d] the judicial functions historically vested in bankruptcy and district courts" and "performs many of the functions that had been assigned previously to the bankruptcy judge." *Ibid.*

Finally, the court of appeals held that many of the alleged missteps by the United States Trustee, such as the appointment of the examiner and the sale of the real properties, were "approved by the bankruptcy court." Pet. App. 42. Those bankruptcy proceedings "addressed and satisfied" petitioners' constitutional rights

in the bankruptcy process. *Ibid.* If petitioners disagreed with the bankruptcy court's rulings, the court explained, the proper course was to appeal those rulings, but petitioners "voluntarily elected to abandon their appeal" instead. *Id.* at 43 n.6. Confirmation of the reorganization plan thus barred, under principles of res judicata, any claims that petitioners could have pressed in the bankruptcy proceedings. *Ibid.*

ARGUMENT

The judgment of the court of appeals dismissing the case on sovereign immunity grounds is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' record-bound collateral challenge to completed bankruptcy proceedings does not otherwise merit an exercise of this Court's certiorari jurisdiction.

1. Petitioners seek (Pet. 6-14) this Court's review of the court of appeals' judgment that the Bankruptcy Code did not abrogate the United States' immunity from a private civil suit for monetary damages and equitable relief. Petitioners, however, identify no conflict in the circuits on that question or any conflict between the court of appeals' ruling and this Court's precedent that merits this Court's resolution. Nor is the United States aware of any such conflict.

In any event, the judgment of the court of appeals is correct. Petitioners filed suit solely against the United States Department of Justice and the Office of the United States Trustee as official components of the United States government. The United States government, however, is immune from suit unless it has expressly waived its sovereign immunity. See *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260

(1999); *Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992).

Petitioners first contend (Pet. 7) that Section 106(a) of the Bankruptcy Code contains the necessary waiver of sovereign immunity. That Section abrogates sovereign immunity for a "governmental unit to the extent set forth in this section" with respect only to specified provisions of the Bankruptcy Code. The court of appeals held that the waiver of sovereign immunity did not apply because "governmental unit" is defined to exclude the "United States trustee while serving as a trustee in a case under this title." 11 U.S.C. 101(27). Petitioners (Pet. 7-9) argue that the court of appeals erred because the United States Trustee was not, in fact, actually "serving as trustee" in petitioners' bankruptcy proceedings.

That argument is of no help to petitioners. Even if the limitation on the waiver of sovereign immunity applies only when a United States Trustee performs the functions of a traditional private trustee in a bankruptcy case, petitioners' post-bankruptcy, civil damages litigation does not fall within the scope of Section 106(a)'s waiver of sovereign immunity for bankruptcy proceedings. A statutory waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." *Blue Fox*, 525 U.S. at 261. The waiver in Section 106(a) is, by its terms, expressly restricted to claims arising under sixty specific sections of the Bankruptcy Code.[1] Petitioners' civil litigation does not fall within any of those enumerated Sections.

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[1] Section 106(a) provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to

Furthermore, even where the United States has generally waived its sovereign immunity from suit, the availability of monetary relief depends upon an additional express and particularized waiver by Congress. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992) (monetary claims unavailable). This Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for" "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993). Section 106(a)(3), however, authorizes courts only to "issue against a governmental unit an order, process, or judgment *under such sections [of the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure*, including an order or judgment awarding a money recovery, but not including an award of punitive damages." 11 U.S.C. 106(a)(3) (emphasis added). Petitioners' case was not brought in bankruptcy court and does not seek relief under any "such sections" of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Petitioners' claim (Pet. 15-17) that sovereign immunity was waived by the participation of the Internal Revenue Service in the bankruptcy proceedings overlooks the fact that the waiver of sovereign immunity in Section 106(b) pertains only to claims filed by the governmental unit *in the bankruptcy court* and arising

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the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

out of the "same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. 106(b). Damages arising from the alleged failure of the United States Trustee to supervise an examiner have no conceivable nexus to any claims advanced by the Internal Revenue Service during petitioners' bankruptcy proceedings.[2]

2. Petitioners separately argue (Pet. 14-15) that sovereign immunity should not bar their claim for injunctive and declaratory relief. That argument fails for two reasons. First, sovereign immunity "shields the Federal Government and its agencies from *suit*," not just from monetary liability. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) (emphasis added). While such immunity does not generally extend to actions against federal officials, see *Ex parte Young*, 209 U.S. 123 (1908), petitioners have not named any individual federal officers as defendants.[3]

Second, petitioners lack standing to seek such equitable relief. The complaint contains no allegation of ongoing illegality relevant to any protected legal in-

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[2] In addition to lacking the requisite waiver of sovereign immunity, nothing in the Bankruptcy Code or any other source of law of which the United States is aware creates a separate civil cause of action for damages or injunctive relief against the United States arising out of alleged missteps in bankruptcy proceedings.

[3] It is doubtful that a suit would lie even if petitioners had named an individual official in light of both the absence of any allegation of ongoing unlawful conduct and the comprehensive remedial scheme already provided by the Bankruptcy Code for claims timely raised while those proceedings are ongoing. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 74-75 (1996) (holding that *Ex Parte Young* suits are impliedly barred by Congress's enactment of a detailed remedial scheme and when the relief sought can only be provided by the sovereign *qua* sovereign).

terest held by petitioners. Nor does the complaint allege that petitioners will be involved in any type of bankruptcy proceedings, let alone those involving the active participation of a United States Trustee, at any time in the foreseeable future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) (where a plaintiff "has made no showing that he is realistically threatened by a repetition of his experience * * *, then he has not met the requirements for seeking an injunction in federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice"); *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (where it is "most unlikely" that a plaintiff would again be subject to the operation of a statutory scheme, no case or controversy of "sufficient immediacy and reality" exists to permit declaratory relief). Indeed, petitioners' inability to establish irreparable injury—"a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again"—forecloses any claim for equitable relief on its merits.

3. Petitioners also seek (Pet. 12-13, 22-23) this Court's review of the court of appeals' holding that the challenged actions of the United States Trustee fall within the Federal Tort Claims Act's (FTCA) exemption for discretionary functions. See Pet. App. 38 (citing 28 U.S.C. 2680(a)). That fact-bound claim does not merit this Court's review and, in any event, is incorrect for three reasons.

First, petitioners never invoked the FTCA as a basis for relief either in their complaint or in district court. The argument therefore was waived, as the court of appeals held. Pet. App. 38.

Second, petitioners have failed to allege before any court, including this Court, that they satisfied the

FTCA's administrative exhaustion requirement, see 28 U.S.C. 2675(a). That requirement is jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106, 112 (1993).

Third, the court of appeals was correct (Pet. App. 38) in holding that any attempt by petitioners to amend the complaint to add an FTCA claim would be futile. Petitioners' claim for relief turns upon the United States Trustee's "alleged negligence in his general duties of selecting, monitoring, and investigating the examiner appointed in this case," and those actions are "quintessentially" matters of discretion "within the meaning of the FTCA discretionary function exception." *Id.* at 38-39; see also *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-814 (1984).

Petitioners' reliance (Pet. 13) on *Berkovitz* v. *United States*, 486 U.S. 531 (1988), is misplaced because the Trustee has no non-discretionary duty to supervise and investigate examiners. While the United States Trustee nominates a person to serve as examiner "after consultation with parties in interest," 11 U.S.C. 1104(d), the formal selection of the examiner is by the bankruptcy court. Furthermore, nothing in the Bankruptcy Code charges the United States Trustees with supervising examiners once they are appointed by the court. See 11 U.S.C. 1106 (powers of examiners). To the contrary, examiners' powers and compensation are set by the court. 11 U.S.C. 330(a)(1), 1106(b). While 28 U.S.C. 586 vests the United States Trustee with the authority to "supervise * * * the administration of cases and trustees," that assignment is couched in the broadest of discretionary terms. See 28 U.S.C. 586(a)(3) (United States Trustee shall "supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11" by engaging in certain tasks "whenever the

United States trustee considers it to be appropriate").[4] The Trustee's statutory duties thus involve "an element of judgment or choice"; the statute does not "specifically prescribe[] a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536.

4. Finally, petitioners' failure to contest the real estate sales or any actions of the United States Trustee prior to the closure of the bankruptcy proceedings and the court's adoption of the reorganization plan forecloses this collateral attack. See 11 U.S.C. 1141(a) ("[T]he provisions of a confirmed plan bind the debtor."); see also *Trulis* v. *Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect."); 5 *Collier on Bankruptcy* ¶ 1141.01[1], at 1141-3 (Lawrence P. King ed., 15th ed. 1995). As the court of appeals correctly held, petitioners' claims arising out of the conduct of the bankruptcy case are barred because "[t]he confirmed plan acted as res judicata as to claims that could have been raised in the bankruptcy proceedings, but were not." Pet. App. 43 n.6.

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[4] See also 28 U.S.C. 586(a)(3)(G) (empowering the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor the progress of cases under Title 11 and take "such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress"); 28 U.S.C. 586(a)(3)(H) (allowing the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor applications under Title 11 "and, whenever the United States trustee deems it to be appropriate, [to] fil[e] with the court comments with respect to the approval of such applications").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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REPLY

BRIEF

(3)

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No. 03-984

In The

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Richard A. Balser and Corinne L. Balser
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v.

United States Department of Justice

And

The Office of the United States Trustee
Respondents

On Petition For Writ Of Certiorari

To The Ninth Circuit Court Of Appeals

PETITIONERS REPLY IN REBUTTAL T O RESPONDENTS OPPOSITION

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REPLY TO BRIEF IN OPPOSITION
PETITIONERS' REBUTTAL

INTRODUCTION

The Petition For Writ of Certiorari raises Federal questions, including several of *first impression* in the Ninth Circuit, concerning the sovereign immunity of the Department of Justice and the Office of the United States Trustee. For this reason the Court is asked to review the original "Questions Presented For Review" as presented on the first page of the Petition For Writ Of Certiorari, as a supplement to the "Question Presented" in the Respondents' Brief.

The Court is further asked to note that this case centers on an extreme loss of the principal value of an estate while under the direct control of the United States Trustee, despite oversight and approval by the Court, but wherein:

1. Land titles signed off by the U.S. Trustee-appointed Examiner for $1.4 Million were then resold for a net gain of $5 Million;

2. In the Examiner's filing, the appraisal, purchase values and document preparations were provided through a single attorney. This attorney was employed by the Examiner and by the Purchaser at the same time (an unconscionable conflict of interest);

3. The Examiner was brought into the Ch 11 process by way of a Petitioner signed stipulation to take over rental property management, and to concurrently help Petitioners with rezone, easement, road dedications, and sales activities, with terms subject to further agreement by Petitioners.

4. The Court's later order, issued without notice or hearing on the U.S. Trustee's agenda for another topic, authorized the Examiner to sign off all closing documents on behalf of, but without participation by, the Petitioners. This was a shocking disregard and violation of several statutes.

5. The IRS, having filed BAR claims totaling $322,414 is regarded by Petitioners as having shared responsibility for

the expediencies and abruptness advocated by the U.S. Trustee in facilitating the loss of assets at liquidation values despite the Ch 11 status of the estates. (Individuals within the IRS have been more helpful and even encouraged waiver of some penalties, but then several of these never materialized. A March 15, 2004 notice for a refund of $7,567.75 from tax year 1997, was a most recent notice.)

This Reply is submitted to better address the Respondent's Brief (hereinafter "RB") as to its content, implications, and conclusions. References will be made directly to the RB by both Section (or paragraph) number and page number to facilitate reference to the item or statement being clarified.

CLARIFICATIONS WITHIN STATEMENT

Petitioners emphasize that the purpose of Congress in creating the Office of the United States Trustee as explained in RB 1, pg 2, was "To remove any appearance of bias...." Also noted therein was that the Trustees are "executives of the bankruptcy network," responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." Additionally, Trustees were to "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena."

Clearly, the Petitioners' case is the direct result of the failure of the U.S. Department of Justice and the Office of U.S. Trustee to provide programs and procedures in a manner necessary to accomplish this purpose and to fulfill each officer's responsibilities and obligations in the proceedings below.

In RB 2, pg 2, Respondents misstate the reference to the stipulation executed by Petitioners. This contract between the Petitioners (Balsers, as the debtors) and the creditor (CGA) that filed the involuntary bankruptcy actions against the Balsers provided "...hereby stipulate that a manager shall be appointed to manage the rental properties securing CGA's deeds of trust...subject to reasonable approval by the debtors...an

Examiner be appointed by the court for the limited purpose of managing the rental properties."

The Court later granted its "Order Appointing Examiner With Expanded Powers" which covered the rental property management under "Powers and duties which are exclusive to Examiner" and provided further assistance and support to Balsers under:

"Powers and duties which are concurrent with Debtor-in-Possession: To undertake such actions as are reasonable and necessary to fulfill the conditions of the rezone decision and to segregated the properties zoned PCB, PRD-MR and LDMR therein including but not exclusively to seek approval...make application for...dedicate new roads...enter into and effectuate agreements...further to seek approval of a sale...under 11 U.S.C. § 363...."

One month later the United States Trustee filed an "Application For Order Approving Appointment Of Chapter 11 Examiner," which stated in part: "The United States Trustee has appointed Perry Stacks as Examiner in the above - captioned case." The Application further stated: "...Mr. Stack's connections with the debtors, creditors, any other parties in interest, their respective attorneys and accountants, the United States Trustee, and persons employed in the Office of the United States Trustee are limited to the connections set forth in the Examiner" Acceptance and Declaration. WHEREFORE, Applicant requests that the Court enter an Order approving the appointment of Perry Stacks, as the Chapter 11 Examiner in above-captioned case." The Court thereupon granted its "Order Approving Appointment...."

The Petitioners, as then debtors-in-possession, had received no notice that Examiner Perry Stacks simultaneously served as private trustee on another judge's case in which *the eventual buyer's counsel also served as trustee Stacks' own attorney.* Nor could Petitioners have possibly anticipated that its Stipulation could result in the *Examiner's secret negotiation and filing of a sale contract for 80% of the estate's real estate assets without Petitioner's review, or even a notice* - and then

be construed to allow the *Examiner to sign a deed transferring ownership from the Balsers, again without notice or a hearing and without the faulting of Debtor-in-Possession prior to the granting of the Court's authorization so to do.*

This last breach of the law effectively transferred property rights of ownership from Petitioners to the Examiner, much as a quasi-trustee, but *apparently void of any corresponding fiduciary responsibilities.* Petitioners contend that this Court action thereby violated 11 U.S.C. § 321(b), § 1106(b) and § 1107(a) by the removal of the debtors-in-possession from control of the estates' real property assets. (This latter Court action was performed during a non-related court session scheduled by the U.S. Trustee on a different topic.)

Another serious misrepresentation by Respondents is their negative comment in RB 2, pg 3, in reference to the appeal filed by Petitioners: "...but they failed to prosecute their appeal, resulting in its dismissal." In fact, *the appeal was filed on July 1, 1996.* Petitioners' efforts to perfect such an appeal of the sale was ultimately concluded on October 5, 1997, by the Court's sua sponte entry of an oral order appointing a trustee following Petitioner's introduction of evidence confirming the purchaser's breach of the purchase agreement for the remaining 20% of adjoining property. This late morning appointment violated 11 U.S.C. § 1104 and 1107, in that there was *no notice, no hearing, and no cause as to incompetence to justify the removal of the Debtor-in-Possession.* By mid-afternoon the Court's withdrawal of the oral order prior to its consummation was met as negotiated immediately following the morning hearing on the condition that the property transfer deeds, releases, and stipulation for an order to dismiss the appeal would first be executed by Petitioners within a two-hour window. The alternative would have been conversion to Chapter 7 and resolution of the real estate sale and termination of the appeal being handled by a newly assigned trustee. Petitioners' capitulation and forced concession in executing the stipulation should certainly not be characterized as "but they

failed to prosecute their appeal…" as presented by Respondents above.

The RB 2, pg 3, explanation of the motion filed by the Examiner to seek approval of the sale of real property correctly reported that "the bankruptcy court granted the creditor's motion and approved the sale of the real property." What is not explained is that the creditor and purchaser at that time had a secret agreement and had negotiated the sale and prepared all the sale documents for execution and filing by the Examiner *without review or concurrence by the Petitioners.* The file code on the computer generated Examiner's documents was the same as the attorney's code for the purchaser's correspondence. *This was the same attorney employed by the Examiner on a bankruptcy case being processed simultaneously under another judge.* With such a gross conflict of interest where is the Department of Justice and Office of the United States Trustee on the appearance of fairness issue now?

The argument is not whether sovereign immunity ever applies, but rather *does it apply* in this case despite the very specific waivers?

In RB 4, pg 4, the clear error in the decision of the Ninth Circuit Court of Appeals centers on its misinterpretation of Section 106(a). Petitioners' named the Department of Justice and Office of the United States Trustee as defendants. Both entities are "governmental units" covered under the abrogation of sovereign immunity as stated under this code *and* the United States Trustee is also a "governmental unit" when not serving as a private trustee (as in a Chapter 7 bankruptcy). Furthermore, the U.S. Trustee is precluded from serving as trustee in a Chapter 11 case by 11 U.S.C. Section 1104(d) which requires that the "United States trustee...shall appoint...one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case." The exception claimed by the Ninth Circuit "unanimous court of appeals" affirmation thereby attests to the violation of this code even with regard to their "preferred" extension of the statutory exclusion. If such a policy is upheld

then this Court is asked to consider such an application to be a further indictment of the Office of the United States Trustee itself.

It is well noted that the Respondents do not present the Respondents' own interpretation of Section 106(a) but rather carefully only quote the error made by the Ninth Circuit as though it could be applicable. This Court is asked to make its own interpretation and to rule accordingly.

The RB 4, pg 5, statement by Respondents defend the ruling below that the application of the Federal Tort Claims Act is waived if not timely invoked by Plaintiffs in the District Court. Certainly, the actions and behavior were described as wrongdoings therein, but the pro se recognition as to a particular area of law was admittedly lacking. Yet the District Court's instructions followed in filing the claims did not prepare the Petitioners for this requirement. The Respondents' reference to Bivens restates the lower court's view that the application of "judicial immunity" is not situation dependent, but rather is justified by job title alone. Petitioners believe that this directly conflicts with earlier Supreme Court holdings as to judicial immunity only applying to judicial functions, not also to administrative acts or responsibilities under a job title position.

The last paragraph of RB 4, pg 5, relies on the Ninth Circuit view that those proceedings "approved by the bankruptcy court" are thus made pure, rightful and acceptable. By this analysis one judge's misdirection, oversight, error, or ignorance, overrules all statutory laws and constitutional rights. These prevalent issues in our justice system are why Petitioners are now before this Court! Of course, it is clear that Petitioners did, in fact, file and maintain appeals throughout the wrongful land sale processes. And, until foreclosed upon by the court's oral appointment of a trustee, and forced execution of the final stipulation for order of dismissal so as to regain Petitioners' status and authority as Debtor-in-Possession, Petitioners did maintain working toward eventually achieving a successful reorganization and final decree. As to any effect of res judicata

based upon the confirmed reorganization plan, there has never been a final decision on the issues timely raised and claims pressed during the bankruptcy proceedings, because they were never litigated, and the approved plan specifically includes and provides for the waiver of any preclusion based upon plan approval so as to recover the losses suffered.

CLARIFICATIONS WITHIN ARGUMENT

The Respondents state their support of the Ninth Circuit Court of Appeals dismissal based upon sovereign immunity. Petitioners assert that the position taken by both the Respondents and the court below are not justified by the code. The issue comes down to interpretation of a single phrase under 11 U.S.C. § 106(a). The Petitioners provided a detailed analysis (Pet.7-9). The abrogation of sovereign immunity of the United States Trustee in a Chapter 11 Bankruptcy case is supported by both the terminology used and the intent of the legislature which produced it. The lower court did not address the abrogation of sovereign immunity clearly stated therein with respect to the defendants, Department of Justice and Office of the United States Trustee. The Petitioners contend that sovereign immunity is not a legitimate defense in this case.

RB-Arg-1, pg 6, further states that no "... conflict exists with this Court or with any other court of appeals." This finding supports Petitioner's contention that this is correctly a case of first impression that deserves to be resolved by the Supreme Court. The United States government has expressly abrogated its sovereign immunity in this case by statute. This Court should want the "first decision" to be a correct one. To allow otherwise is simply building case law on a foundation of sand that must ultimately collapse.

As to Respondents' further contention (or hope) that Petitioners' claims cannot be related to any of the enumerated Sections, this suggestion is defeated by review of the following Sections which Petitioners contend present or contain applicable provisions:

Title 11, Sections: 105, 106, 108, 303, 346, 362, 363, 364, 365, 502, 503, 505, 506, 510, 522, 523, 524, 1107, 1141, 1142, 1143, and 1146.

Respondents proceed under RB-Arg-1, pg 8, to search out another escape route, "...even where the United States has generally waived its sovereign immunity from suit..." by referencing liability for "monetary exactions". The court is reminded that the sale of Petitioners' property for $1,592,500 by the Examiner, who signed off the deed in a quasi-trustee action on a sua sponte court authorization without due process for notice or hearing at which Petitioners, as debtors-in-possession, (and with a higher priced offer already in hand), could have otherwise objected, but instead resulted in a land resale after one year capital gains tax qualification for a sale price of $7,752,000. The net gain based upon real estate excise tax statements was near $5,000,000. This amount represents the net loss in equity to Petitioners and is therefore the basis for recovery by way of this case.

RB-Arg-1, pg 8, in the last paragraph the Respondents appear to challenge those claims filed by the IRS against estate assets during the bankruptcy. However no review was made in the court below to confirm whether the claims filed arose out of the "same transaction or occurrence out of which the claim of such governmental unit arose." Certainly, the tax liabilities on gains and losses competed with fees and charges by the U.S. Trustee for timely payment. The Court's rush toward liquidation of Debtor's assets at a one quarter of fair market value is attributed by Petitioners to factors which include the combined negative demands presented to the court by counsels representing both the U.S. Trustee and the IRS. The very clear nexus to Petitioners' claims are certainly related to case management by the U.S. Trustee, the Examiner, and the IRS counsel, and their being represented during the court proceedings and hearings as the government's own experts.

A yet to be resolved issue still exists between Petitioners and several of the original claims holders, including the IRS. Petitioners' assets and liabilities before bankruptcy were taken

over by the formation of the estates in which the Examiner, as directed by the U.S. Trustee and encouraged by other government claims holders including the IRS, squandered assets and left most of the original (unsecured) claims not paid or even addressed. These failures in integrity and fiduciary responsibilities can only be cured now by either injunctive or declaratory relief (as best understood by the pro se Petitioners). Those responsible should be held accountable for these adverse consequences of their actions (and inactions).

The Respondents challenge in RB-Arg-2, pg 9, against Petitioner's standing to seek equitable relief as presented. But the "allegation of ongoing illegality..." relates to the total failure of justice and the risk to our national security because of the failure of government agencies in both the Executive and Judiciary branches to endorse and pursue integrity, responsibility and accountability throughout their respective operations.

CONCLUSION

The issue brought to the Supreme Court by this case purports to challenge concepts. Similarly, a Bivens action against Examiner Perry Stacks or U.S. Trustee attorney Gail Geiger would do nothing toward making the Office of the United States Trustee and Department of Justice revise their handling of ALL Chapter 11 bankruptcies in which the current abusive system results in the raiding of assets by unconscionable trustees and their counsels, and misdeeds by other exploitive operaters in the business world.

Certainly, the Petitioners would like to recover their $5,000,000 lost while under the surveillance of the U.S. Trustee and influence of the IRS. Our loss of retirement assets at age 73 is not reassuring. It was not right, nor just, and certainly was not necessary.

Better yet would be the impact that a favorable decision by this Court could have upon reintroducing justice into Chapter 11 proceedings, and perhaps into all bankruptcy proceedings,

by declaring that *integrity and fiduciary responsibility* are essential elements necessary to avoid further victimization of bankruptcy participants and to preserve their civil rights, and that *accountability* must prevail to assure such implementation.

The best result (and most ambitious goal) would be the adoption of the principle that freedom, as promoted world wide by the United States, seeks to secure the blessings of Liberty by ensuring that integrity, responsibility and accountability prevail throughout the private, the public, and business sectors and, by example, under all three branches of our government.

Yes, with our own lives and 17 children, grandchildren and great-grandchildren, as the Petitioners we believe we have a very direct basis for seeking injunctive, declaratory, or other equitable relief. All members of our American society are threatened by the extent of bankruptcy court abuse and corruption now prevalent. (See Appendix A).

Petitioners believe that the Petition, as supplemented by this reply, adequately rebuts all arguments presented by Respondents, and respectfully request this Court's granting for the Writ of Certiorari.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of April, 2004.

Petitioner: Corinne L. Balser
Corinne L. Balser

Petitioner: Richard A. Balser
Richard A. Balser

APPENDIX
INDEX TO CURRENT CASES

Similar failed cases under wrongdoings by the Office of the United States Trustee are also known to Petitioners; examples are as follows:

In re Linda L. Fogh, in U.S. District Court, Western District of Washington at Seattle, Case 99-00251-SS
Lack of jurisdiction in underlying cases; abuse of bankruptcy process; Alleged bribe paid to bankruptcy judge's relative to cover up void judgments; Partnership ignored and property sold well below fair market value.

In re James Keenan, in U.S. District Court, Southern District of California Case 96-00871-PB. Real estate assets in excess of $27 million squandered to pay $3 million in debts; unrelated partnerships were sold and proceeds were not paid to partners, according to the law; debts were satisfied more than four years prior yet trustee retains Keenan's estate until he signs pervasive release of all claims and allows trustee to retain $1 million for an additional five years.

In re John C. Lewis, in U.S. District Court, Western District of Washington at Seattle, Case 02-11147-SJS
Multimillion dollar estate processed under Ch 11, under a plan of liquidation managed by a U.S. Trustee appointed case trustee; Debtor contends estate squandered at far below market values and yet debtor is prohibited from personal living or counsel expense.

In re Donna Sturman, in U.S. District Court, District of New York, Case 89-11932-PCB
Heir to one quarter of parents approximate $100 million estate; placed in involuntary Ch 7 without any

service; case remains open with various compromises made in Donna's absence; Trustee took over non bankruptcy property where there have been fraud judgments against third parties resulting in prison sentences one example of arson where the trustee failed to purchase insurance; Donna and her two children remain homeless.



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No. 03-984

In The

Supreme Court of the United States

Richard A. Balser and Corinne L. Balser
Petitioners

v.

United States Department of Justice

And

The Office of the United States Trustee
Respondents

On Petition For Writ Of Certiorari

To The Ninth Circuit Court Of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Introduction: The Petitioners herein respectfully move this court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered on May 17, 2004, and (2) granting the Petition. As grounds for this Motion, Petitioners herein state the following nine significant points:

1. Petition Seeks Retribution, Not Damages:

Petitioners (Appellants) first want to respectfully address the mischaracterization of this case by Respondents (Defendants) as being a claim for "damages" and "monetary exactions." It is not. This case is a claim for restitution of net asset values near $5,000,000 taken from the Petitioners as *victims* of alleged, but yet unproven, fraud, collusion, perjury, misrepresentation to the court, violation of due process, admitted conflicts of interest, denial by court action of Petitioner's right to perfect an appeal and a lack of proper representation for an appeal, among other numerous violations of statutory and contractual law. There has been no defense offered otherwise. This Court has the power to recover all costs of restitution, including the government's own costs should it choose so, for wrongdoings from those perpetrators, within the government or private enterprise, who shared in the distribution of the $7,752,000 sale of Petitioners' assets.

2. Case Raises Issues of First Impression:

The issues raised are several of *first impression* in the Ninth Circuit, concerning the sovereign immunity of the Department of Justice and the Office of the United States Trustee. The allegations to which these issues relate represent serious failures within both the Executive and Judiciary branches of government as to administering and upholding constitutional rights "for a redress of grievances;" deprivation "...of life, liberty, or property, without due process of law;" "...the right of trial by jury...;" and "...the equal protection of the laws."

Recent criticisms by members of the legislature reportedly may have contributed to the recent creation of a committee to evaluate the judiciary's discipline system with appointments by Chief Justice William Rehnquist (reported in the Legal Times on June 1, 2004). In any event, in the case presented hereby, the alleged misinterpretation and misapplication of a clear statute regarding the abrogation of sovereign immunity serves to shield Defendants from accountability. The conclusions reached are puzzling to Petitioners and may well deserve better clarification of intent by the legislature. Petitioners hereby request that the opportunity to obtain such clarification be granted by this Court by its deferring the filing of denial, if the petition is not otherwise to be granted at this time.

3. Sovereign Immunity Clearly Abrogated:

It is imperative that the Court take further note that reliance upon sovereign immunity to shield the Department of Justice, the Office of the United States Trustee, or even the United States Trustee (when the latter is NOT "*...acting as trustee in a case")* might well be perceived as an executive and judiciary disregard of legislative intent beyond the line of debatable interpretation. The law reads one way. But the Department of Justice and Judiciary, with the ill-advised consent of the Courts below, have acted to use immunity as a shield covering not just DOJ administrative officers of the court but even the responsible departments from being held accountable. The response of the Solicitor General is no better, in that it tends to divert attention away from the responsible government agencies listed as Defendants to only parrot the weak and incorrect interpretation of 11 U.S.C. § 106(a), which clearly abrogates sovereign immunity in this case as to the Defendants. (Petitioners are prepared to show at trial that this case relates to 22 of the 60 specific sections under which Respondents disavow relativity, any one of which would thereby abrogate immunity.)

4. Accountability Due By Respondeat Superior: The world has witnessed what a sense of immunity from being held accountable for the adverse consequences of The War on Terror, from the invasion of Afghanistan to Iraq, is premised upon the United States seeking to hold those responsible to also be held accountable. Clearly, our national commitment seeks to enforce justice through respondeat superior policies. The Supreme Court is asked to follow the same policy in this case. Furthermore, the state itself applies respondeat superior accountability for the adverse consequences of wrongful acts by its own employees? Should not the federal Court recognize and respect local State regulations similarly?

5. Immunity Compromises A Redress of Grievances: The one institution capable of most directly arresting the infectious spread of such cancer-like arrogance of immunity within our government and industry is the Supreme Court of the United States. The use of sovereign immunity, or judicial immunity, or qualified, discretionary or absolute immunity should not preclude an ultimate accountability for the impacts of wrongful behavior. Responsibility to grant restitution should remain accessible at some level above those protected individually by immunity in their work The Court is asked to preserve some avenue for victims of wrongdoing to achieve the redress of grievances, restitution or relief from the consequences of either criminal or civil unjust acts.

Ultimately, any application of immunity must be well confined to within careful limits defined by due process, which was found lacking in the present case. But even then provisions for a respondeat superior approach should be applied in the event of adverse consequences which result from unjust or unlawful behavior in the implementation of existing laws. Certainly, the United States government looks to respondeat superior in its pursuit of justice on law enforcement actions conducted by its various enforcement agencies. It is only appropriate that the officer or office or

department above should be accountable for the adverse consequences of wrongful behavior by subordinates within the government. In any event, victims, such as the Petitioners herein, should not be left without an effective avenue for a redress of grievances or hope of restitution where wronged.

6. New Crime Victims' Rights Act Lists Restitution:

On April 22, 2004, the Congressional Record reported that Senate Bill 2329, cited as the "Crime Victims' Rights Act" the (CVRA) passed the Senate by a vote of 96 to 1, with but three senators not voting. The Court should note this strong bipartisan support by the legislature, as the issue reflects directly upon the Petitioners' related pleadings. For the purpose of this new proposed Act "the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense." Certainly, the Petitioners have been harmed by their loss of $5,000,000 through a series of wrongdoings including alleged crimes listed in the Petition For Writ of Certiorari. Petitioners expect to confirm at trial that they are victims in the complete sense of the term. The Department of Justice and the Judiciary, to this point in the case of Balser Vs Dept. of Justice and Office of the United States Trustee, have failed us. The appropriate pathway to restitution and redress of this grievance is through this Court's eventual granting of the Petition for Writ of Certiorari.

7. Restitution by Due Process And Good Legislation:

Petitioners assert that they have a right to restitution under the "Victims' Rights and Restitution Act of 1990" which also provides that if a court does not offer restitution then it must state on the record the reasons why restitution was not ordered. If this Court does not grant the Petition For Certiorari then Petitioners would need to seek alternative routes through the complex legal systems to achieve redress and restitution under existing (or proposed) Victims Rights legislation. The present case includes an option by which the Court can assure both that restitution be paid to Petitioners while the costs therefore to the

Federal government and its agencies can be recovered from the private industries and their legal representatives who were at the base and most profited by fraud, misrepresentation to the court, conspiracy, conflict of interests, and an obstruction of justice. This Court is requested to grant the Petition For Writ of Certiorari so that this nine year complex legal struggle can be justly consummated. Certainly, additional legislation is necessary to correct both bankruptcy statutes and victims rights to restitution to better clarify existing laws and protections. However, these changes to preserve accountability cannot be effected within the current legislative term.

8. Petition Strives to "Set Bar" to Correct Wrongdoings in Federal Courts:

Petitioners, having been deprived of property by "unreasonable governmental interference," 360 U.S. 492, necessarily is entitled to be made whole for the resulting damages. Dismissal of this case on wrongful interpretations of the applicability of sovereign immunity toward either the Department of Justice or the Office of the United States Trustee, or even toward the United States Trustee under Chapter 11 Bankruptcy, does not erase the deprivations of property rights or eliminate the obligations of these defendants to be held accountable and to make, or see to the making of by others, the restitution for the losses suffered.

The importance and substantiality of the questions presented for review have not been denied. Nor have the allegations of wrongdoings and unlawful actions by the officers and agents of Defendants been controverted. The only defense is that the District Court judge assumed that the agencies named as defendants are to be correctly represented as if their fiduciary obligations and responsibilities were transferable to a Chapter 7 type of private trustee. However, this is despite this case being a Chapter 11 with only an examiner, but no private trustee appointed to replace the Petitioners as Debtor-in-Possession. This gross misinterpretation was defended by the

Ninth Circuit Court of Appeals and recently even by the Solicitor General. It should still not preclude restitution.

9. Conclusions - - Plenary Review is Justified:

Petitioners consider this case to be significant in that the United States Trustee primarily performs administrative acts, as in making appointments as for the hiring of the examiner for limited responsibilities, without noting the conflict of interest in the Trustee's recommendation for approval submitted for confirmation by the bankruptcy court. But then even a judge can be denied immunity as in Forester v White, 44 U.S. at 224, wherein justice O'Connor offered that the court "has generally been quite sparing in its recognition of claims to absolute official immunity," holding that the actions of Judge White in firing Ms. Forrester were not entitled to judicial immunity. The court refused to apply even quasi-judicial immunity. Nor should it apply in the present case during hiring, especially when the hired examiner's working relationships with a buyer's attorney being also the examiner's employee on another case violates statutory requirements for selection of a disinterested candidate.

Wherein the U.S. Trustee supported the expansion of the Examiner's authority to execute the sale of Petitioners' properties without notice or hearing, and thus assumed a fiduciary duty to preserve the estates, the Supreme Court in Harlow et al v Fitzgerald, 457 U.S. 819 made clear that "...a reasonably competent public official should know the law governing his conduct."

As to the Department of Justice and Office of the United States Trustee being held accountable, the Supreme Court in Mitchell v Forsyth, 472 U.S. 511, 520 the Court succinctly concluded: "the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions." How then can those responsible for conducting

U.S. Trustee administrative and supervisory functions related to the bankruptcy process be granted immunity from suit for restitution from unjust enrichments?

Certainly, the Supreme Court must help to identify and establish the true principles on which precedents for the administration of justice under the U. S. Constitution are to be respected, if our freedoms are to survive. George Washington wrote to James Madison on his inauguration as our first president of the United States on April 30, 1789, "it is devoutly wished on my part, that these precedents may be fixed on true principles." On May 28, 2004, President Bush is quoted as declaring in an interview with Paris Match magazine: "And now is the time to work together to promote the values we believe in, which is human rights and human dignity and rule of law and freedom and justice." The Petitioners' allegations are that "true principles" have been ignored in the handling of this case. As to the appeal, can freedom and justice prevail without integrity, responsibility and accountability?

In light of the inability of the Government to face the issues presented in the petition without grossly distorting the statutory provisions related to sovereign (and even judicial) immunity, the need for plenary review of the action below is indisputable. Indeed, Petitioners suggest that summary reversal be now in order. In the alternative, Petitioners move this Court to withdraw the filing of denial to set aside final consideration until Petitioners are allowed a reasonable time frame to gain legislative amendments to retroactively apply their rights to restitution under Title 11, U.S.C. § 11 bankruptcy and/or under current Crime Victims Rights Act legislation.

Respectfully submitted,

Richard A. Balser

Richard A. Balser
Petitioners, Pro Se

6/11/04
7/06/04

Corinne L. Balser

Corinne L. Balser,

CERTIFICATE OF PETITIONERS

The Petitioners hereby certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2, being the "intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented."

Richard A. Balser 6/11/04 7/6/04

Richard A. Balser, Petitioner, Pro Se

Corinne L. Balser

Corinne L. Balser, Petitioner, Pro Se